

Labor Law Issues Facing Multinational and Japanese Companies Operating in the United States and United States Companies Using Japanese-Style Labor Relations: Agenda Items Under the "New Labor Relations"*

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I. INTRODUCTION

One of the largest obstacles Japanese companies face when they advance to a foreign market and set up their branches is that of personnel management. There is a remarkable difference between the image of labor and current labor practices in the United States and that in Japan. . . . As a result, therefore, labor practices upon which the so-called Japanese-style management depends cannot be easily applied *as they are* without problems.

Therefore, Japanese companies have to select the essential elements of Japanese-style management which they want to maintain, transplant them onto American soil, and aim to adapt them to the local situation.¹

Labor relations in the United States have undergone dramatic changes in recent years with the emphasis on efficiency and competitiveness, the establishment of more non-unionized work places, the phenomenon of declining union membership, and the emergence of alternative forms to collective bargaining.² These changes have been fueled by the increased presence of foreign competitors whose less expensive imports may displace not only American products but also American businesses and their workers. Conversely, these foreign businesses, particularly Japanese companies, are creating new job opportunities for American workers by their direct investments in the United States. Japanese companies also are attempting to implement many of their traditional management and industrial relations policies in their United States ventures.

These events present challenges of great significance to both American and Japanese companies. American industries must meet foreign competition by changing traditional management and labor relations approaches³ or face the possibility of extinction or, at least, a lesser share of the market. Japanese companies operating in the United States must adapt their traditional management and labor relations practices to comply with applicable United States labor laws. The Japanese to date, however, have been reluctant to change the essential elements of such practices.

This article identifies the legal issues generated as a result of attempts by American and Japanese companies to adjust to changing management and labor relations in the United States. Japanese companies often discover to their dismay that American unions perceive their management styles emphasizing employee cooperation and loyalty as anti-union and women view their use of male nationals in many key managerial positions as exclusionary and discriminatory.

¹ Y. Kuwahara, *Foreign Investment and Labor-Problems Involved in Japan's Direct Investment in the United States* 15 (Aug. 1985) (unpublished manuscript available with author) [hereinafter cited as *Japan's Direct Investment*] (emphasis added).

² See Farber, *The Extent of Unionization in the United States*, in *CHALLENGE AND CHOICES FACING AMERICAN LABOR* 15, 16-22 (T. Kochan ed. 1985). Secretary of Labor William Brock recently emphasized the increasingly close relationship between international trade and domestic labor policies and the need to seek appropriate accommodations: "Our ability to compete in world markets suffers when confrontation rather than cooperation becomes the preferred approach to labor-management relations. Fortunately, the trend now seems to be going in the other direction." *DAILY LAB. REP. (BNA)*, Oct. 23, 1985, at F-3.

³ The automobile industry's labor agreements at General Motors-Toyota and General Motors' new Saturn Project are recent examples of changing labor and management relations in the United States. These approaches are of general use outside that industry as well. See *infra* text accompanying notes 83-91.

When Japanese companies resort reluctantly to American-style dismissals, they find that resulting damages under an unjust dismissal lawsuit may cause liability unimaginable under the Japanese legal system. These not atypical situations, combined with traditional Japanese reluctance to seek early legal advice from their attorneys, create legal issues that more often should be resolved by accommodation of Japanese management and labor practices with applicable United States labor law requirements rather than by confrontational litigation.⁴

Section II, by way of background, examines the nature and type of Japanese business ventures in the United States and the emerging Japanese styles of managing the operations and labor relations of both Japanese and American companies, and the resulting adaptations of these practices by United States companies. In Section III this article will focus on the applicability of American labor laws to Japanese and multinational companies. Section IV will identify and analyze in some detail the many emerging substantive labor law issues faced by Japanese companies operating in the United States and by American companies using Japanese-style labor relations. These issues include equal employment opportunity laws, especially Title VII of the Civil Rights Act of 1964, the National Labor Relations Act, and developing case law dealing with unjust termination.

II. JAPANESE AND MULTINATIONAL COMPANIES OPERATING IN THE UNITED STATES

A. *Nature and Type of Investments and Relationship to Trade Deficit*

Japan and the United States would have much to lose if the amount of Japanese direct investment in the United States or the amount of trade between Japan and the United States were substantially curtailed by legislative prohibitions. While net capital inflows of all foreign direct investment into the United States totalled nearly \$10 billion in 1983,⁵ about \$2 to \$2.5 billion is estimated to have been invested by Japanese companies alone.⁶ United States trade

⁴ Although commentators have written about various aspects of this subject area, none has sought to integrate comprehensively the "new industrial relations" practices of Japanese and American companies with United States labor laws by identifying and discussing the emerging legal "agenda items."

⁵ INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, INTERNATIONAL ECONOMIC INDICATORS 55 (June 1984).

⁶ Japan's Direct Investment, *supra* note 1, at 2 (estimate of Japan's Ministry of Finance). United States statistics show that the net increase in Japanese direct investment in 1983 was \$1.5 billion. *Id.* The estimates differ because the Commerce Department's practice, unlike that of Japan's Ministry of Finance, is to calculate on the year end balance of investment. *Id.* at 3. At the end of 1983, the remaining amount of Japan's direct investment in the United States was over

exports to Japan in 1983 totalled nearly \$22 billion, while imports from Japan approximated \$43.5 billion.⁷

The countries' mutual reliance has created problems, especially for the United States. Increased imports from Japan have created not only a burgeoning trade deficit, but growing trade friction between the two countries.⁸ The Japanese government is quick to point out that while the United States trade deficit is growing, Japan's share of that deficit is actually declining, having fallen from 44% in 1982 to 30% in 1984.⁹ Still, lively debate in Congress on trade barrier legislation concerning Japan is expected to continue.¹⁰

The impact of the trade deficit on the American economy is direct and great. It is estimated that the import of less expensive products has displaced over one million American jobs.¹¹ Various solutions to this problem are being debated in the United States.¹² Many people are calling for the politically sensitive develop-

\$11 billion. *Id.* See generally Yoshino, *Emerging Japanese Multinational Enterprises*, in MODERN JAPANESE ORGANIZATION AND DECISION-MAKING 146, 165 (E. Vogel ed. 1975) (Japan's direct investments); Belli, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1980*, SURV. CURRENT BUS., Aug. 1981, at 58 (survey of foreign direct investors).

⁷ Japan's Direct Investment, *supra* note 1, at 4.

⁸ Japan, one of the largest trading partners of the United States, has one of the largest trade imbalances with the United States. The trade imbalance with Japan in 1985 stood at \$49.7 billion. Honolulu Advertiser, Feb. 1, 1986, at B3, col. 3. This is a significant part of the estimated total trade deficit of \$150 billion in 1985. Church, *The Battle over Barriers*, TIME, Oct. 7, 1985, at 22.

⁹ Address by Tetsuya Endo, Consul General of Japan, at the 24th Annual Meeting of the National Conference of Lieutenant Governors, Honolulu, Hawaii 4 (Aug. 13, 1985) (unpublished manuscript available with author).

¹⁰ Legislative debate is expected even though the recent trend in the declining value of the dollar vis-a-vis the yen has eased the trade deficit disparity and some of the political pressures. For a discussion of various trade barrier bills in Congress, see Church, *supra* note 8, at 27-31.

¹¹ See DAILY LAB. REP. (BNA), Nov. 12, 1985, at A-9 (jobs lost in 700,000 households per year); *id.*, Oct. 23, 1985, at F-1 (Senator Dan Quayle reported "loss of thousands, sometimes millions, of jobs"). There is some debate, however, whether other factors—such as out-moded American managerial practices, out-dated labor relations practices, and inefficient and obsolete production facilities—have also contributed to this phenomenon.

¹² Proposed solutions include trade barrier legislation, laws which assist interim adjustments of declining industries and aid in renovating the production-base of certain industries, and other approaches which shift resources to meet the challenges of foreign competition. See P. LAWRENCE & D. DYER, *RENEWING AMERICAN INDUSTRY* 1-16, 275-87 (1983). See also Tanaka & Middleton, *Injured Industries, Imports and Industrial Policy: A Comparison of United States and Japanese Practices*, 15 CASE W. RES. J. INT'L L. 419 (1983) (discussion of comparative approaches used by Japan and the United States with regard to "escape clause relief" under 19 U.S.C. § 2251(a)(1) (1976)).

One commentator proposed four reforms based on the Japanese experience to solve some of the problems facing American industry: (1) "[m]easured exposure of American firms to international competition," (2) linking of "industry-specific governmental assistance . . . to ascertainable changes in corporate behavior," (3) curbing of hostile takeovers of corporations, and (4) "reexam-

ment of a "national industrial policy"¹³ which would coordinate United States resources and government support of industries in a manner vaguely similar to the Japanese approach, in an attempt to better equip American companies to develop strategic industries and to vie with overseas competition.¹⁴

Although the United States trade deficit displaces American jobs, hundreds of thousands of jobs are being *created* by overseas direct investment in the United States.¹⁵ As of early 1985, the size of Japanese direct investment in the United States included 440 Japanese-based or affiliated factories¹⁶ and has been valued at some \$11 to \$14 billion.¹⁷ Japan has also increased its "hi-tech" imports into the American and world markets.¹⁸ Although the precise number of jobs and the ultimate impact on the trade deficit are difficult to measure, overseas direct investment in the United States seems to be "part of the solution" rather than the problem in easing possible trade friction with United States trading partners, especially Japan.

Recent years have also seen an increase in joint ventures between Japanese

ination of business and legal education in the United States." Tsurumi, *Labor Relations and Industrial Adjustment in Japan and the United States: A Comparative Analysis*, 2 YALE L. & POL'Y REV. 256, 270-71 (1984).

¹³ See Kantrow, *The Political Realities of Industrial Policy*, HARV. BUS. REV., Sept.-Oct. 1983, at 76; Reich, *Making Industrial Policy*, 60 FOREIGN AFF. 852 (1982); Tsurumi, *supra* note 12, at 270; Blumenthal, *Drafting a Democratic Industrial Plan*, N.Y. TIMES, Aug. 28, 1983, § 6 (Magazine), at 31.

¹⁴ See Tsurumi, *supra* note 12, at 256-59. One author took the national industrial policy one step further by boldly calling for greater "joint economic growth" and cooperation between the United States and other countries such as Japan. J. GRESSER, PARTNERS IN PROSPERITY: STRATEGIC INDUSTRIES FOR THE UNITED STATES AND JAPAN 343-76 (1984).

¹⁵ As of 1979, American affiliates of foreign corporations employed approximately 1.6 million workers in the United States. Howenstine, *Selected Data on the Operations of U.S. Affiliates of Foreign Companies, 1978 and 1979*, SURV. CURRENT BUS., May 1981, at 36.

It is difficult for economists to measure the precise number of jobs created by Japanese companies. Japanese estimates place the number at 80,000 to 150,000. See Japan's Direct Investment, *supra* note 1, at 11; Address by Tetsuya Endo, *supra* note 9, at 5. A 1981 United States Department of Commerce survey revealed that Japanese-affiliated manufacturers in the United States employed 47,726 workers; other unofficial estimates placed the figure at nearly 100,000 persons. Japan's Direct Investment, *supra* note 1, at 11-12.

¹⁶ Japan's Direct Investment, *supra* note 1, at 11.

¹⁷ See Address by Tetsuya Endo, *supra* note 9, at 5.

¹⁸ The companies investing in the United States involve many of Japan's premier manufacturing and "hi-tech" industries such as Nippon Electric Co., Hitachi Ltd., Fujitsu Ltd., Mitsubishi Electric Corp., Oki Electric Industry Co., Shimadzu Corp., and Sumitomo Electric Industries, Ltd. Japan's Direct Investment, *supra* note 1, at 7. See Tanaka & Middleton, *supra* note 12, at 429-30 (discussing the television industry). See also Emch, *Japanese Direct Investment in American Manufacturing*, 17 STAN. J. INT'L L. 1, 1-4 (1981) (televisions, semiconductors, high speed data printers, electronics).

and American interests,¹⁹ which permit a more direct method of sharing profits between Japanese and American partners. They also allow easier sharing of technology and, in certain industries such as steel, promote the possible revitalization of an otherwise declining industry. A draw-back for Japanese companies is their loss of retained management rights which they prize so highly and consider to be a dominant reason for their business successes. Whether Japanese companies utilize a subsidiary or joint venture form, however, they seek to adjust their management and labor practices to the American business environment.

B. Emerging Styles of Management and Labor Relations: Understanding the "New Labor Relations"

1. Dominant Characteristics of Japanese Personnel Management Practices

Central to the Japanese system of management and industrial relations has been its somewhat benign treatment of workers. Although some United States labor unions would view as paternalistic the Japanese system of close cooperation and concern for the workers, some employers and unions are finding that there are several advantages to the Japanese system.²⁰ Management philosophies and industrial relations policies of Japanese employers generally contain five underlying principles:

First, their primary concern is the continued existence and further development of their corporation. Second, they regard all company employees, including themselves, as members of the same corporate community. Third, they take an egalitarian view of income distribution between labor and management within the company. Fourth, they are crucially concerned with maintaining stability and peace in

¹⁹ In the automobile industry, for example, NUIMI, the joint venture of Toyota and General Motors, started production in California in 1984. Japan's Direct Investment, *supra* note 1, at 8. In addition, a number of Japan-United States co-ventures have been formed in the steel industry: Nisshin Steel-Pittsburgh Steel, Nippon Kokan-National Steel, and Kawasaki Steel-Kaiser Steel. *Id.* at 9.

²⁰ One author has suggested that resource managers in the United States should consider human resource management the most important aspect of corporate strategic planning by treating human resources as a renewable asset rather than as a disposable cost of production. Tsurumi, *supra* note 12, at 266-67. See also Horton, *Training: A Key to Productivity Growth*, MGMT. REV., Sept. 1983, at 2-3 (advocating training of employees).

Japanese companies operating in the United States have already implemented human resource management, and American companies have started to give serious attention to this approach. Certainly there is no lack of interest in Japan's managerial policies and much continues to be written about them at a technical and popular level. See, e.g., W. OUCHI, *THEORY Z* (1981); E. VOGEL, *JAPAN AS NUMBER ONE* (1979).

the company's industrial relations. In other words, they strive to avoid industrial disputes and strikes, often at any cost. Fifth, they tend to reject the intervention of outside labor groups in any negotiations over internal labor problems, an attitude that might be described as exclusionist.²¹

These principles pervade the Japanese personnel management system, and although there are many similarities with the American system, one of the most apropos of the many comparisons made of American and Japanese management approaches is that "Japanese and American management is 95 percent the same and differs in all important respects."²²

a. Collectivism

Japanese notions of familism and collectivism, which are based on Japanese culture and the *amae* relationship,²³ merge individual interests with group interests.²⁴ Japanese workers see themselves as contributing to a group effort rather than to an individual cause.²⁵ These same principles are also evident in Japanese corporate structures. For example, the managerial structures of the *zaibatsu*, a pre-World War II Japanese conglomerate, was based on "familial principles of hierarchy, loyalty, and dependency" which were "essentially that of

²¹ Shirai, *A Supplement: Characteristics of Japanese Managements and Their Personnel Policies*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 369, 374-75 (T. Shirai ed. 1983) [hereinafter cited as *Characteristics of Japanese Managements*]. These principles are derived from deeply held historical customs and traditions in Japan. Japanese have long used the family analogy, "appealing to workers in terms of the Confucian concept of *wa*—spiritual ascendancy through harmony and common effort." Karsh, *Managerial Ideology and Worker Co-Optation: The US and Japan*, in VIABILITY OF THE JAPANESE MODEL OF INDUSTRIAL RELATIONS 81, 87-88 (Int'l Indus. Relations Ass'n 1983).

²² R. PASCALE & A. ATHOS, *THE ART OF JAPANESE MANAGEMENT* 85 (1981) (quoting Interview with Taizo Ueda, senior economist, Honda Motor Co., in Tokyo, Japan (July 1, 1980)).

²³ *Amae* is defined as a family or group dependency and patronage relationship. See T. HANAMI, *LABOR RELATIONS IN JAPAN TODAY* 48-49, 55 (1979) (discussing *amae* in the employer-employee relationship).

²⁴ Japanese employers and employees enjoy a mutually beneficial relationship. Employers often provide recreational facilities and bonuses and treat workers in a paternalistic manner. Employees reciprocate by being loyal and by increasing productivity and quality. See E. VOGEL, *supra* note 20, at 146-52. See also E. REISCHAUER, *THE JAPANESE* 127-37 (1978) (discussing the Japanese emphasis on "group"). The Japanese principle of collectivism, therefore, is self strengthening. The Japanese employee's often unwavering loyalty to his company is not a real sacrifice because he also gains from such loyalty. Similarly, an employer benefits from its benevolent treatment of its employees by profiting from increased productivity and quality.

²⁵ In the United States, on the other hand, an individual is responsible for his own fate, often to the exclusion of responsibilities to others, and is warned about the dangers implicit in collective responsibilities. See F. SUTTON, S. HARRIS, C. KAYSEN & J. TOBIN, *THE AMERICAN BUSINESS CREED* 251-54 (1956).

the hierarchical familism of traditional Japan."²⁶ These principles seem to persist in modern Japanese corporations. The parent-child or lord-servant (*oyabun-kobun*) relationship is analogous to the parent (*oya-gaisha*) and subsidiary (*ko-gaisha*) company relationship.²⁷ The parent maintains firm control over its subsidiary by providing managerial, technical, and financial support; the subsidiary, in turn, provides services and out-reach for the parent.

Personnel practices are also based on a cultural background of familism. Two of the most significant management personnel practices are the tradition of cooperation between employer and employees and the system of seeking consensus before implementing decisions.

Japanese firms try to achieve cooperation by treating their employees as part of the family, thus humanizing employment relations. These efforts manifest themselves in policies which discourage layoffs and firings and which encourage retention and retraining rather than replacement of employees when new technology would otherwise displace them. The system of having supervisors, as "associates," working side-by-side with workers de-emphasizes "management-worker" class distinctions. All levels of management attempt to mix with workers at the work place and at work-related social gatherings.²⁸

Cooperation is further manifested in company policy providing for joint consultation (*roshikyogiseido*) through committees and meetings between the employer and the workers. While Japanese law mandates some of these joint committees, or at least their subject matter,²⁹ these committees also deal with issues involving terms and conditions of employment and seek to raise productivity and prevent industrial conflict.³⁰

An example of such joint consultation in Japan is collective bargaining.³¹

²⁶ K. HAITANI, *THE JAPANESE ECONOMIC SYSTEM* 118 (1976). Although the *zaibatsu* was outlawed after World War II, some commentators suggest that it has reappeared as *keiretsu* (a grouping or alignment). The *keiretsu*, however, while frequently involving group consultation, ultimately exercises independent business judgments. See *id.* at 121. The Sumitomo Keiretsu is composed of 16 firms, including Sumitomo Shoji, the parent company, Sumitomo Metal Industries, Sumitomo Chemical, and Sumitomo Bank. The Dai-ichi Kangyo Banking Keiretsu comprises 57 firms, including C. Itoh & Co. *Id.* at 122.

²⁷ See *id.* at 17-18, 25-26.

²⁸ See generally Tsuda, *Personnel Administration at the Industrial Plant Level*, in *WORKERS AND EMPLOYERS IN JAPAN* 399-440 (K. Okochi, B. Karsh & S. Levin eds. 1974). This practice of "paternalism" has been dubbed "welfare corporatism." T. HANAMI, *supra* note 23, at 28-31, 36-40.

²⁹ Mandated subject matters include legal requirements for occupational safety and health and labor standards dealing with work rules and overtime requirements. Kuwahara, *Worker Participation in Decisions Within Undertakings in Japan*, 5 *COMP. LAB. L.* 51, 54 (1982) [hereinafter cited as *Worker Participation*].

³⁰ *Id.* at 54, 63.

³¹ "Collective bargaining at the enterprise level through joint consultation is the most popular form of worker participation at present." *Id.* at 53. Joint consultation "exists in 63 percent of the

Three features characterize the Japanese collective bargaining system: "(1) it is practiced within the boundaries of each individual enterprise; (2) labor unions are concentrated in the large enterprises; and (3) both white- and blue-collar workers are members of and are represented by the same union."³² Joint consultation, regardless of form, is further facilitated by the sharing of information with employees, which in turn supports a necessary element of cooperation—trust.

Consensus decision-making (*ringi* system) also flows from the continual meetings of quality control groups, joint consultation committees, and collective bargaining representatives. The workers and management, through a series of "orchestrated" meetings, contribute and exchange ideas as they strive for unanimity in the announcement of the final "decision," now accepted by all.³³

b. Job Flexibility

Another characteristic of Japanese management is job flexibility: the hiring, training, and utilization of employees for a variety of job functions within the employer's enterprise. Job flexibility permits greater managerial use of the worker to provide performance when and where it is needed without the encumbrances of job classifications, inadequate training, work rules, or contract restrictions.³⁴ Thus, Japanese management emphasizes functional interdependence rather than job specificity, and group rather than individual perform-

labor-management relationships where there are more than 100 employees." W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 12 (1984). Many Japanese claim, however, that joint consultation is more "an attack on collective bargaining . . . than an adjunct to it." *Id.*

³² Koshiro, *Development of Collective Bargaining in Postwar Japan*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 205, 205 (T. Shirai ed. 1983).

³³ Consensus decision-making differs from American management decisions which more often originate from and are implemented by top executives without prior consultation with work force or subordinate staff personnel.

Whatever amount of time is required by the Japanese *before* the "decision" is made, a similar amount is required by westerners *after* the decision is taken. The basic difference between the two approaches is to be found in the style of execution. It is obvious that following a decision by consensus (Japanese-style) the execution of that decision by those involved will be highly motivated in the sense that "this is *our* decision." On the other hand, the execution of a decision "on command" remains just that—motivation being a very secondary implicit element.

Ballon, *Management Style*, in BUSINESS IN JAPAN 127 (P. Norbury & G. Bownas rev. ed. 1980) (emphasis original). See also Rohlen, *The Company Work Group*, in MODERN JAPANESE ORGANIZATION AND DECISION-MAKING 185, 191-95 (E. Vogel ed. 1975). The Japanese also engage in before-meeting maneuvering (*nemawashi*) to ensure the desired unanimous outcome. Karsh, *supra* note 21, at 86.

³⁴ These "restrictions" are often found in the United States and are fostered by unions, particularly the craft unions, to protect and promote the worker's skills.

ance.³⁵ By reducing job categories and rotating workers within a plant, Japanese managers seek to "[broaden] an employee's job skills . . . improve employee morale and help nurture a holistic perspective regarding the firm's business and competitive posture."³⁶

The characteristics of job flexibility require that Japanese employers take great care in the recruitment of new employees "into the family" since they generally will be retained for their entire work career.³⁷ Japanese recruiters emphasize not just the somewhat objective factor of the worker's ability to perform the work but also place great importance on subjective qualifications relating to personal and social characteristics, such as how well the worker will "fit in," his or her prior conduct, character, thought, and home environment.³⁸ The use of these subjective factors in interviews, background checks, and testing may expose the Japanese employer to charges of racial and anti-union motivations in potential violation of American labor laws.³⁹

c. Conflict Avoidance

Another dominant characteristic of Japanese personnel management relations is the use of pervasive, culture-based, conflict-avoidance techniques to resolve disputes. Cooperation and joint consultation procedures both work toward harmony in the workplace.⁴⁰ Japanese labor dispute resolution has three distin-

³⁵ One commentator described the Japanese approach as follows:

Rather than the job function being the basic unit of shop-floor individual worker behaviour (job description, classification and job evaluation translated into wage payment programmes), job function in Japan is related to work unit rather than to individual performance. The Japanese employer pursues efficiency through the improvement of the performance of the work unit as a whole and not the aggregate behaviours of individual workers. In order to improve the achievement of the entire unit, it is normal and expected that individual workers will cross job lines within the unit to lend a helping hand to a unit cohort.

Karsh, *supra* note 21, at 88.

³⁶ Tsurumi, *supra* note 12, at 267.

³⁷ The thoroughness of the Japanese recruiting process is exemplified by the practice of the American-based Nissan Motor Manufacturing Corp. Nissan's plant managers chose "2,650 factory workers from 30,000 applicants after severe selection and training." Japan's Direct Investment, *supra* note 1, at 17. The company also selected 425 people—including supervisors, managers, technicians and field workers—and sent them to its Kyushu factory in Japan for further training. *Id.*

³⁸ Karsh, *supra* note 21, at 88-89.

³⁹ See *infra* Section IV.

⁴⁰ For a discussion of collectivism, see *supra* text accompanying notes 23-33. It is, the author suspects, no coincidence but a tribute to the Japanese approach that Japan, with one-half the population of the United States, lost only one-twelfth the number of working days because of strikes or lockouts. W. GOULD, *supra* note 31, at 13. The United States lost 38 million working

guishing characteristics:

1. There is a "societal pressure towards consensus, which places a heavy responsibility on the parties to resolve a dispute by themselves and without resorting to overt conflict."
2. There is a "tendency for industrial action to be taken in demonstrative form."
3. The union, "being mindful of the extent to which its numbers' interests are bound up in the enterprise, is likely to refrain from any action likely to prejudice its long-term future: thus, harassment rather than damage is what is aimed at."⁴¹

The Japanese, therefore, while certainly having their share of conflicts, emphasize cooperation, compromise, and reconciliation in resolving disputes.⁴² Labor unions in the United States, on the other hand, have tended to approach most violations of workers' rights in a somewhat more legalistic manner under contract and statutes.⁴³ There is an observable trend, however, that United States companies and United States-based Japanese companies are adopting some of the features of the Japanese system of dispute resolution.⁴⁴

d. The "Three Pillars" of Japanese Industrial Relations

The Japanese have incorporated the traditional attributes of their personnel management relations, such as cooperation and working for the common good of the enterprise, into their more recent industrial relations policies.⁴⁵ These policies, the so-called "three-pillars" of Japanese industrial relations, are lifetime or permanent employment (*shushin koyo*), wage-seniority policies (*nenko*), and

days in 1976; Japan lost only 3.25 million. *Id.*

⁴¹ Duff, *Japanese and American Labor Law: Structural Similarities and Substantive Differences*, 9 EMPLOYEE REL. L.J. 629, 636 (1984) (citing Organization for Economic Cooperation and Development, *The Development of Industrial Relations Systems: Some Implications of Japanese Experience* 25-26 (1977)).

⁴² One commentator stated, "To an honorable Japanese the law is something that is undesirable, even detestable, something to keep as far away from as possible. . . . To take someone to court to guarantee the protection of one's own interests . . . is a shameful thing. . . ." Y. NODA, *INTRODUCTION TO JAPANESE LAW* 159-60 (1976).

⁴³ See W. GOULD, *supra* note 31, at 14-16.

⁴⁴ See *infra* text accompanying notes 83-91. For a discussion of the Japanese practice of dispute resolution, see T. HANAMI, *supra* note 23, at 113-224; Matsuda, *Conflict Resolution in Japanese Industrial Relations*, in *CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN* 179, 181-201 (T. Shirai ed. 1983).

⁴⁵ These policies, while drawing on tradition, were actually devised after World War II. See S. LEVINE, *INDUSTRIAL RELATIONS IN POSTWAR JAPAN* 46-58 (1958).

enterprise unionism.⁴⁶

The first pillar, lifetime or permanent employment, is based on the idea that, in exchange for job security, the employee will remain loyal to his employer.⁴⁷ An employee is retained even though his work performance needs improvement and is dismissed only for grave misconduct.⁴⁸

Employers, however, also make great use of temporary employees whose job security and other benefits are usually dramatically less than regular employees.⁴⁹ Temporary employees have been dubbed "the shock absorbers of business fluctuations in a lifetime employment system" and have contributed to Japanese employers' flexibility in quickly responding to market changes.⁵⁰

Women often serve in this capacity. They are concentrated in lower skill, "traditionally female jobs"⁵¹ and in jobs requiring "patience . . . manual dexterity, and work calling for a warm, personal touch or care."⁵² Nearly 70% of Japanese women workers are employed as clerks, service workers or factory operatives,⁵³ and a mere 1% serve in supervisory or managerial positions.⁵⁴ Although some legal reforms were instituted to improve the status of women after World War II, societal norms run deep and women still stand inferior to men by custom and law.⁵⁵

Once an employee leaves employment, permanent status usually will be forfeited. Many women, by "choice" or employer expectation, resign their jobs

⁴⁶ For a general discussion of these three policies, see T. HANAMI, *supra* note 23, at 25-28, 88-112.

⁴⁷ See *id.* at 28.

⁴⁸ *Id.* at 25-26. This employment practice is available to a diminishing number of Japanese workers, estimated at well below 30%, and usually is provided only by employers with more than 1000 employees. See R. COLE, JAPANESE BLUE COLLAR: THE CHANGING TRADITION 81-82 (1971); R. COLE, WORK, MOBILITY, AND PARTICIPATION 119-20 (1979); T. HANAMI, *supra* note 23, at 31-35.

⁴⁹ See T. HANAMI, *supra* note 23, at 26.

⁵⁰ *Id.*

⁵¹ Women are usually employed as "nurses, midwives, kindergarten teachers, stenographers and typists, key punchers, telephone operators, spinners, yarn twisters, sewing-machine operators, canned food preparers, packers and wrappers, housekeepers, maids, beauticians, waitresses, bar and cabaret hostesses." Nakanishi, *Equality or Protection? Protective Legislation for Women in Japan*, 122 INT'L LAB. REV. 609, 610 (1983).

⁵² *Id.*

⁵³ *Id.* at 609 (citing Prime Minister's Office, Basic Survey on Employment Structure (Oct. 1, 1982)).

⁵⁴ Only 6.9% of all supervisory and managerial personnel are women. *Id.*

⁵⁵ See *id.* at 610-21. The Japanese, however, are beginning to change their traditional view of women. A new Equal Employment Act, supplementing older laws, was passed by the Japanese National Diet in the spring of 1985 and is scheduled to be implemented in the spring of 1986. Suwa, *The Equal Employment Opportunity Law*, JAPAN LAB. BULL., July 1985, at 5. The measures include equal employment opportunities and treatment; equality in education, training, and welfare benefits; and prohibitions on sex, retirement age, and displacement discrimination. *Id.* at 5-7.

following marriage or before birth of their first child. If a woman worker wishes to return at a later time, she often will only be rehired as a temporary worker.⁵⁶ Historically, women have been used in this way as a "buffer and stabiliser" against the vagaries of a changing national or business economy.⁵⁷

The second pillar of industrial relations is the wage-seniority system in which wages, relatively low for the beginning years of employment, are "tied-to" seniority and in effect deferred until later years of employment when the "loyalty" of employees is recognized.⁵⁸ This practice promotes harmony in the enterprise since the wages of younger employees usually will not surpass those of older employees.⁵⁹ The popularity of this system as a pure employment practice, however, seems to be dwindling.⁶⁰

Within companies that have implemented some form of the wage-seniority system, it nevertheless remains a strong motivation for employee productivity and has been described as "[o]ne of the key clues to the mystery of Japanese efficiency."⁶¹ Workers who are hired in the same year compete fiercely for the few openings which appear at their level. This competition motivates employees to increase their productivity.⁶²

"Promotion from within" is also a standard employment practice in Japan which increases worker loyalty and productivity.⁶³ This policy promotes loyalty because the present employees know that they will have an opportunity some

⁵⁶ K. HAITANI, *supra* note 26, at 104-05.

⁵⁷ Such practice tends to protect permanent employees who receive greater benefits and retention rights based on their seniority (*nenko seido*). Matsuura, *Sexual Bias in the Nenko System of Employment*, 23 J. INDUS. REL. 310, 316-20 (1981).

⁵⁸ See T. HANAMI, *supra* note 23, at 26. Yearly bonuses, which may range from three to six times the average monthly wage in good business periods, supplement the workers' low wages. *Id.* For an analysis of the Japanese seniority-wage system in a comparative international context, see Koike, *Internal Labor Markets: Workers in Large Firms*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 30, 30-60 (T. Shirai ed. 1983).

⁵⁹ Such a system can also retard worker mobility, particularly when it requires employees who leave one employer to start work at another employer at the bottom of the seniority ladder or as temporary employees. See T. HANAMI, *supra* note 23, at 34; Koike, *supra* note 58, at 34-35.

⁶⁰ In 1978 only 1% of Japanese enterprises had a strict wage-seniority system, and 46% had a mixed system that considered "age, length of service, past performance, and present performance in job potential." Moreover, there appears to be a shift "toward simply denying wage increases to workers who are beyond their mid-40s." W. GOULD, *supra* note 31, at 104.

⁶¹ T. HANAMI, *supra* note 23, at 27.

⁶² See *id.* at 26-27. Cf. E. VOGEL, *supra* note 20, at 141 (Workers hired in the same year generally receive the same pay. This "tends to dampen competition and strengthen camaraderie among peers during their early years.").

⁶³ Seniority-based promotion schemes in Japan may result in smooth decision-making when a superior is confident that a subordinate "cannot surpass him on the ladder of advancement in the organization, does not feel threatened by competent subordinates and hence can accept their recommendations and criticisms with equanimity. On the contrary, a good work by his subordinates is a credit to the quality of his leadership." K. HAITANI, *supra* note 26, at 91.

time in the future to be considered for new openings. The goal of achieving rank and status, more than the increase in total wages and retirement benefits,⁶⁴ motivates Japanese employees. The "overwhelming majority of Japanese managers" have been promoted from within their particular company.⁶⁵

The third pillar of Japan's industrial relations is enterprise unionism wherein employees are organized on a plant-wide basis rather than on an industrial or craft (occupational) basis.⁶⁶ This provides several advantages.⁶⁷ It enables employers to transfer employees within the company and across job lines, thereby providing the employer with the flexibility to respond to competitive business needs. Enterprise unionism does not involve a strong "outside" union sitting at the bargaining table to pressure the employer into an agreement. The local enterprise union has complete autonomy to make decisions and change its rules as needs arise. This makes the local enterprise union responsive to the employer but may also make the union vulnerable to pressure.

The major characteristic of enterprise unions in Japan, as contrasted with those in some Western societies, is its successful blending of sometimes contradictory functions. "[I]t confronts and resists the employer in order to protect the employees' interests when they conflict with those of the employer. It also cooperates with the employer in promoting the mutual interests of the parties in a

⁶⁴ Wage increases in Japan are relatively modest by United States standards. See Koike, *supra* note 58, at 32-33.

⁶⁵ *Characteristics of Japanese Managements*, *supra* note 21, at 373. It should also be noted: [B]oth blue- and white-collar employees of a Japanese company belong to the same enterprise union and . . . those employees who demonstrate competence and leadership abilities have good prospects of being promoted to top management positions under the internal promotion system. Thus, the appointment of a former union official to a company's board of directors is regarded as a normal progression in Japan's industrial relations system. . . .

Id. at 374.

⁶⁶ T. HANAMI, *supra* note 23, at 88. In enterprise unions:

(1) Membership is limited to the regular employees of a particular enterprise. Other workers not regularly employed in the same plant or firm (temporary and part-time workers) are not eligible for membership. (2) In general, both blue- and white-collar workers are organized in a single union. (3) Union officers are elected from among the regular employees of the enterprise, and during their tenure in office, they usually retain their employee status but are paid by the union. (4) About 72 percent of the enterprise unions are affiliated with some type of federation outside the enterprise, but since most of these federations are loosely organized national industrial unions, sovereignty is retained almost exclusively at the local enterprise-union level.

Shirai, *A Theory of Enterprise Unionism*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 117, 119 (T. Shirai ed. 1983) [hereinafter cited as *Enterprise Unionism*]. Employees in the United States, on the other hand, are organized in unions on an industrial or craft basis. W. GOULD, *supra* note 31, at 3.

⁶⁷ See W. GOULD, *supra* note 31, at 3-5.

particular enterprise."⁶⁸

A final related point is the Japanese use of *kaizen*, a personnel technique to improve efficiency and productivity. This technique calls for employees to act as "ombudsmen" in identifying and suggesting solutions to labor-management problems.⁶⁹

2. *Adjustments of Managerial and Employment Practices of Japanese Companies in the United States*

Japanese companies must examine the extent to which the parent company should become involved in the management of its United States affiliates, whether they are subsidiaries or branches.⁷⁰ This involves two considerations—legal liabilities and benefits and business advantages. Common business reasons for setting up a Japanese parent-American subsidiary relationship include injecting capital and technology from the parent into the subsidiary and entering a desirable market for domestic sale or export. For example, the parent can export components from Japan to the United States subsidiary to complete a product, thus establishing a domestic market presence. The relationship also permits control over quality, domestic competitiveness, work force development, and productivity comparisons.

Once this subsidiary relationship is established, the Japanese parent must decide what employment practices to utilize.⁷¹ Many Japanese management practices, such as worker participation in decision-making, cannot easily be

⁶⁸ *Enterprise Unionism*, *supra* note 66, at 121.

⁶⁹ The fact that some United States and Japan-United States companies are considering the use of *kaizen* underscores its significance. Telephone interview with Masaaki Imai, Chairman of the Cambridge Corp., Tokyo, Japan (Feb. 20, 1986). See also M. IMAI, *KAIZEN* (forthcoming).

⁷⁰ It should be emphasized that Japanese efforts to transplant their style of management are not limited to non-union environments but are used in all settings. See Tsurumi, *supra* note 12, at 269; *Worker Participation*, *supra* note 29, at 63.

⁷¹ Case studies reveal that the Japanese do not automatically transfer their management styles to their American subsidiaries:

For the Japanese subsidiaries, the key to success is being the quality producer and the low-cost producer. They accomplish this via their technology strategies. If they can accomplish both via product or process control, which results in their being different, or better than the competition, they do it. If not, or as added insurance, they then seek to implement a "management-centered" strategy dependent upon the successful transfer of Japanese management practices.

D. Kujawa, *American Workers and Japanese Direct Investment: Case Study Evidence 15-16* (May 2, 1985) (unpublished manuscript available with author) [hereinafter cited as Kujawa Case Study]. See also Kujawa, *Technology Strategy and Industrial Relations: Case Studies of Japanese Multinationals in the United States*, J. INT'L BUS. STUD., Winter 1983, at 9-22 [hereinafter cited as *Technology Strategy*].

transferred.⁷² Japanese companies, however, have managed to transfer some traditional Japanese industrial relations practices to their American subsidiaries.⁷³ For example, there often seems to be a "pervasive presence" of Japanese-style management in the details of production and in the daily life of the workers. The Japanese have introduced the principles of quality circles and other joint committees, working supervisors, and sharing information with workers on traditional "management subject-areas." There also seems to be increased use of job flexibility although this tends to be curbed in unionized settings.⁷⁴

Japanese companies must then adapt these practices to the culture of the United States in order for such practices to be compatible with the American business climate.⁷⁵ Modification or displacement varies with the interest of the Japanese parents in effectuating transfers of their personnel systems.⁷⁶ Although Japanese, like American, management usually prefers a non-union environment, it seems quite able to cooperate and work well with American-style unions.⁷⁷

Japanese companies must also determine the extent to which Japanese nationals will operate their American-based companies.⁷⁸ Japanese companies em-

⁷² *Worker Participation*, *supra* note 29, at 63. According to Kuwahara, "[d]ifficulties would result from the lack of characteristics peculiar to Japan; its trade union organization, its historical background, and its legal framework." *Id.*

⁷³ See generally Kujawa Case Study, *supra* note 71, at 3-19.

⁷⁴ See Japan's Direct Investment, *supra* note 1, at 20.

⁷⁵ Kuwahara noted:

It is quite unrealistic to assume that a specific management system developed in a country, for example Japanese management, can be transferred to firms in other countries without any transformation in the cultural climate of the respective country . . . [especially] in the case of industrialized countries where indigenous culture or management institutions are firmly established.

Id. at 24. Studies on the transferability of Japanese-style management and industrial relations into various countries confirm the thesis that the Japanese must adapt their system in order to be effective. See, e.g., Jain & Ohtsu, *Viability of the Japanese Industrial Relations System in the International Context: The Case of Canada*, in VIABILITY OF THE JAPANESE MODEL OF INDUSTRIAL RELATIONS 95, 106 (Int'l Indus. Relations Ass'n 1983); Thurley, *How Transferable Is the Japanese Industrial Relations System? Some Implications of a Study of Industrial Relations and Personnel Policies of Japanese Firms in Western Europe*, in VIABILITY OF THE JAPANESE MODEL OF INDUSTRIAL RELATIONS 116, 127 (Int'l Indus. Relations Ass'n 1983). One study indicated that at least in a union-management setting, however, Japanese subsidiaries are "truly not innovators in personnel matters." Kujawa Case Study, *supra* note 71, at 12.

⁷⁶ See Kujawa Case Study, *supra* note 71, at 3-13.

⁷⁷ See Tsurumi, *supra* note 12, at 269 (discussing Hitachi Metals and United Auto Workers Union, and Sanyo and International Union of Electrical Workers). Japanese companies, however, are often not averse to opposing unionization at a number of plants. Kujawa Case Study, *supra* note 71, at 10, 12. See Marett, *Japanese-Owned Firms in the United States: Do They Resist Unionism?*, 35 LAB. L.J. 240, 245-50 (1984) (discussing Japanese resistance to unions).

⁷⁸ Companies hire home-country nationals for executive positions "to exercise parental control and to introduce their own way of doing business into their U.S. affiliates." Sethi & Swanson,

ploy Japanese nationals in all executive levels—high, middle, and junior levels⁷⁹—while other foreign companies tend to employ their nationals only in higher management positions.⁸⁰ Furthermore, the proportion of Japanese to non-Japanese executives is far greater in trading companies than in manufacturing companies.⁸¹ Sometimes the managerial positions themselves become permanent and different Japanese nationals are rotated in and out of such assignments.⁸²

3. Resulting Adaptations by United States and Japanese-United States Joint Venture Companies

Japanese-American joint ventures⁸³ and an increasing number of United

Problems for Foreign Companies: Compliance with U.S. Discrimination Laws, MGMT. REV., June 1979, at 32 [hereinafter cited as *Foreign Compliance*].

⁷⁹ *Id.*

⁸⁰ Statistics reveal that few foreign companies staff their American-based management positions exclusively or even predominately with home-country nationals. Only one-half "frequently" use such persons as directors and in executive positions. The approximate percentages are 17% for presidents, 32% for vice-presidents, 32% for upper management below vice-president, 25% for middle management, and 0% for front-line supervisory positions. Greer & Shearer, *Do Foreign-owned U.S. Firms Practice Unconventional Labor Relations?*, MONTHLY LAB. REV., Jan. 1981, at 44, 45.

⁸¹ In fact, "[t]rading companies have largely transplanted the Japanese management system abroad," and "officials dispatched from the Japan head office virtually monopolized all the top management positions abroad. . . ." A. YOUNG, *THE Sogo Shosha: JAPAN'S MULTINATIONAL TRADING COMPANIES* 228-29 (1979). One reason for this is that executives in trading companies must be familiar with the Japanese language, culture, customs, and products in order to facilitate communication between the home office and customers.

The transfer of the Japanese management system and the occupation of middle- and top-level management positions by Japanese ensures the flow of communications (including whom to send a telex to or talk to in the consensus oriented decision-making process), avoids misunderstandings (so easy in a culture where unspoken words and gestures can be more important than spoken and written words), and saves much time.

Id. at 229. See Krause & Sekiguchi, *Japan and the World Economy*, in *ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS* 383, 389-97 (H. Patrick & H. Rosovsky eds. 1976) (general discussion of the characteristics and successes of Japanese trading companies).

⁸² Kujawa concluded from his study of nine Japanese subsidiaries in the United States that:

Substantial numbers of parent-company technical specialists have been assigned to the Japanese subsidiaries to facilitate technology transfers, to train U.S. workers and to monitor production systems. This has been true in every case. In some, however, the assignments have become permanent (even though specific personnel on assignment have rotated).

Kujawa Case Study, *supra* note 71, at 15. See also *Technology Strategy*, *supra* note 71, at 18-19.

⁸³ Joint ventures occur in many product areas including the steel (e.g., Nippon Kokan K.K. Co. with Martin Marietta and National Steel Co.), high-technology (e.g., Fanuc Ltd. and General Motors), and auto (e.g., Toyota-General Motors) industries. Japan's Direct Investment, *supra* note

States companies have adopted many Japanese-style approaches to management and industrial relations.⁸⁴ In the Toyota-General Motors joint venture, for example, the joint venture agreement calls for use of a variety of "adaptive" management-labor relations approaches including joint consultation, flexible job duties, and incentive systems designed to humanize employee relations and to increase efficiency and productivity.⁸⁵ The collective bargaining agreements of

1, at 14. See Note, *The GM-Toyota Joint Venture: Legal Cooperation or Illegal Combination in the World Automobile Industry?*, 19 TEX. INT'L L.J. 699 (1984) (history and implications of the Toyota-General Motors joint venture).

Most joint ventures in the United States are bilateral, although there is some indication that multinational joint ventures may become more prevalent. For example, Shin-Etsu Semiconductors Co., Dow Corning, Monsanto, and a West German enterprise are joining to set up two new factories in the United States. Japan's Direct Investment, *supra* note 1, at 14. See also C. WALLACE, *LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE* 15-16 (1983); Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523 (1982); Hadari, *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1974 DUKE L.J. 1.

⁸⁴ It should be noted that official United States policy is to promote cooperative labor-management relations. Labor Management Cooperation Act of 1978, 29 U.S.C. §§ 173, 175a (1982). See DAILY LAB. REP. (BNA), Nov. 5, 1982, at A-3 (Secretary of Labor Raymond Donovan stated that labor and management must "stop fighting and start helping each other."). But see Levitan & Johnson, *Labor and Management: The Illusion of Cooperation*, HARV. BUS. REV., Sept.-Oct. 1983, at 8 (Cooperative labor-management relations are "more of a placebo than a panacea.").

Several American companies, in fact, have developed management industrial relations policies independent of the Japanese model. See T. PETERS & R. WATERMAN, *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES* (1982) (analysis of successful American companies). For example, Delta Airlines, a largely non-union company has been run like "family" since the 1920's and has long had policies of retraining employees, lifetime job security, promotion from within, open door management, and joint consultation, and an emphasis on high quality. See R. PASCALE & A. ATHOS, *supra* note 22, at 177-80, 205. See also *Airline Industry Update*, MONTHLY LAB. REV., Nov. 1983, at 72 ("In 1982, as appreciation for a pay increase, Delta's 36,000 employees contributed \$30 million to buy the company an airplane."); Serrin, *The Way That Works at Lincoln*, N.Y. Times, Jan. 15, 1984, § 3, at 4, col. 3 (reporting on Lincoln Electric Co.'s unique worker-management system "featuring high wages, guaranteed employment, few supervisors, a lucrative bonus incentive system and piecework compensation").

American employers have also established quality of worklife committees and programs to create a more cooperative and productive work environment. Companies which have successfully used such programs include ALCOA, IBM, 3M, General Electric, and Lincoln National Life Insurance Co. See Ackoff & Deane, *The Revitalization of ALCOA's Tennessee Operations*, 3 NAT'L PRODUCTIVITY REV. 239 (1984); Katz, Kochan & Gobeille, *Industrial Relations Performance, Economic Performance, and QWL Programs: An Interplant Analysis*, 37 INDUS. & LAB. REL. REV. 3 (1983) (General Motors programs). See also Guest, *Quality of Work Life—Learning from Tarztown*, HARV. BUS. REV., July-Aug. 1979, at 76 (General Motors plant).

⁸⁵ A portion of the "Memorandum of Understanding" between the two companies is reprinted in 23 I.L.M. 36, 36-46 (1984). The Federal Trade Commission, after investigating the joint venture, reported that the joint venture agreement would permit General Motors "to complete its learning of the more efficient Japanese manufacturing and management methods." Statement of Chairman James C. Miller III, Commissioner George W. Douglas, and Commissioner

the United Steel Workers Union provide for a "multicraftsmen" job classification which permits job flexibility and for "labor-management participation teams" at plants "to promote, among other things, efficient and economic operations and to discuss, consider and decide on means to improve the performance of work units."⁸⁶ Agreements negotiated between the United Auto Workers Union and General Motors and the union and Ford also provide for joint union-employer committees to share and discuss information prior to management decisions.⁸⁷

Perhaps one of the most innovative and potentially system-changing agreements adjusting management-labor relations is the new Saturn Agreement between the United Auto Workers and General Motors. The agreement calls for emphasis on work units, worker participation and joint consultation committee structures, consensus decision-making, limited job classifications, a system of qualified permanent employment for certain employees, and reward and bonus schemes.⁸⁸ One of the most striking features is the preamble:

With the understanding that this philosophy of total cooperation offered an opportunity to forge a new relationship and demonstrate that a competitive, world class vehicle could be manufactured in the United States with a represented workforce, authorization to proceed with the Saturn project was obtained.⁸⁹

The philosophy of the Agreement is underscored by its job security provision, "Saturn recognizes that people are the most valuable asset of the organization."⁹⁰ In essence the agreement sets forth a "social contract" and, very much in Japanese tradition, establishes a "relationship" and not just an agreement.⁹¹

III. APPLICABILITY OF UNITED STATES LABOR LAWS TO JAPANESE AND MULTINATIONAL COMPANIES UNDER FCN TREATIES

The actual application of United States labor laws to a foreign corporation or

Terry Calvani Concerning Proposed General Motors/Toyota Joint Venture, 23 I.L.M. at 48, 51. See Nelson, *GM-Toyota Joint Venture and Its Implications Under the National Labor Relations Act*, 1984 DET. C.L. REV. 647.

⁸⁶ Kujawa Case Study, *supra* note 71, at 12.

⁸⁷ See W. GOULD, *supra* note 31, at 13.

⁸⁸ Unsigned Draft Memorandum of Agreement between Saturn Corporation, a wholly owned subsidiary of General Motors Corporation, and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (July 23, 1985) (unpublished draft available with author).

⁸⁹ *Id.* at 1-2 (Preamble).

⁹⁰ *Id.* at 16 (Job Security).

⁹¹ The "contract" reads, "The parties acknowledge that the matters set out in this memorandum are neither all inclusive nor complete." *Id.* at 31 (Commitment of Parties).

its American subsidiary involves several issues: procedurally determining jurisdiction, substantively showing that a violation occurred, and deciding whether an exception would excuse the violation.⁹² This section deals with the first by discussing some of the more recent jurisdictional issues under the Treaty of Friendship, Commerce and Navigation (FCN Treaty)⁹³ which foreign companies operating in the United States must face.

A. Determining "Corporate Nationality" of the Subsidiary

The key jurisdictional issue is whether the legal form⁹⁴ and perhaps the "corporate nationality" of a foreign company will determine the applicability of United States labor laws or the availability of treaty defenses. The designation of "corporate nationality" has been an elusive concept over the years; rules have developed whereby the same corporation may have different nationalities for different purposes.⁹⁵ Three major doctrines have evolved for deciding "corporate nationality": (1) center of administration, (2) center of exploitation, and (3) place of incorporation.⁹⁶

⁹² For a discussion of the substantive issues of violation and defense, see *infra* Section IV.

⁹³ The United States has entered into Treaties of Friendship, Commerce and Navigation (FCN Treaties) with many nations to strengthen peace and friendship by promoting mutually advantageous commercial intercourse and investments and by establishing mutual rights and privileges based on most-favored nation treatment. FCN Treaties provide foreign corporations "national treatment" and allow foreign persons to establish locally incorporated subsidiaries without discrimination based on alienage. "National treatment" includes the right of foreign companies to control and manage their enterprises. See Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 811 (1958); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 949-56 (1979).

⁹⁴ Foreign enterprises may choose from a number of forms when doing business overseas, including pure investment, representatives, branches, wholly owned subsidiaries, and joint ventures.

⁹⁵ Hadari, *supra* note 83, at 36-37. See also Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1524-50 (1960).

⁹⁶ One student commentator observed:

The two most common tests of corporate nationality are the Anglo-American place-of-incorporation test, and the continental *siege reel* (seat) test. Under the Anglo-American test, a corporation is deemed a citizen of the country under whose laws it is chartered. This test is endorsed by the Restatement (Second) of the Foreign Relations Laws of the United States [§ 27]. Under the civil law test, a corporation's nationality is determined by such factors as the location of its principal place of business or corporate headquarters. The main virtue of the place-of-incorporation test is said to be its simplicity and certainty, whereas the seat test is said to reflect better the underlying "economic reality" of the business.

Note, *Employment Rights of Japanese-American Joint Ventures in the United States Under the U.S.-Japan Treaty of Friendship, Commerce and Navigation*, 16 LAW & POL'Y INT'L BUS. 1225, 1238 (1984) (footnotes omitted) (emphasis original).

These tests invoke a variety of criteria, including nationality of management, control, dominant

In *Sumitomo Shoji America, Inc. v. Avagliano*,⁹⁷ the United States Supreme Court decided the issue whether a Japanese subsidiary incorporated in the United States was "foreign" and therefore entitled to protection under the United States-Japan Treaty of Friendship, Commerce and Navigation. The Court held that a wholly owned Japanese subsidiary which was incorporated in the United States was, for purposes of the availability of the FCN Treaty, a company of the United States solely by virtue of its incorporation under American laws.⁹⁸ The Court interpreted two provisions of the FCN Treaty:⁹⁹ Article VIII(1) which gave Japanese "companies" the right to employ "executive personnel . . . of their choice";¹⁰⁰ and Article XXII(3) which defined "companies" as "corporations, partnerships, companies and other associations . . . constituted under the applicable laws and regulations within the territories of either Party."¹⁰¹

The Court held that the language in the FCN Treaty compelled the "place of incorporation test"¹⁰² and rejected¹⁰³ the analysis of the Second Circuit Court of Appeals that the Treaty merely "define[d] a company's nationality for the purpose of recognizing its status as a legal entity but not for the purpose of restricting substantive rights granted elsewhere in the Treaty."¹⁰⁴ *Sumitomo* therefore appears to have resolved the issue of the "corporate nationality" of wholly owned foreign subsidiaries incorporated and based in the United States.

Sumitomo did not, however, resolve the issue of the "corporate nationality" of branch offices or the growing numbers of multinational or international joint ventures. There is some question whether any of the "corporate nationality" tests described above would work very well. A multinational joint venture could fail all of the tests of "corporate nationality" yet have a greater impact on and involvement in American business than a joint venture that passed one or all of

shareholders, principal place of business, and jurisdiction of incorporation. See M. WOLFF, PRIVATE INTERNATIONAL LAW 298-315 (1945); Note, *Employment Rights*, *supra*, at 1238-42.

⁹⁷ 457 U.S. 176 (1982).

⁹⁸ *Id.* at 182-83. See Note, *The Rights of a Foreign Corporation and Its Subsidiary Under Title VII of the Civil Rights Act of 1964 and Treaties of Friendship, Commerce, and Navigation*, 17 GEO. WASH. J. INT'L L. & ECON. 607, 625-27 (1983) (discussing the Court's adoption of the place of incorporation test).

The Second Circuit Court of Appeals had held that the determination of corporate nationality "would depend on a case-by-case analysis of the relevant facts." *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552, 557 n.4 (2d Cir. 1981), *vacated*, 457 U.S. 176 (1982).

⁹⁹ Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as Japan FCN Treaty].

¹⁰⁰ *Id.* art. VIII(1), 4 U.S.T. at 2070.

¹⁰¹ *Id.* art. XXII(3), 4 U.S.T. at 2079-80.

¹⁰² 457 U.S. at 185, 188.

¹⁰³ *Id.* at 182-83.

¹⁰⁴ *Avigliano*, 638 F.2d at 557.

the tests. This is illustrated by joint ventures, such as the Toyota-General Motors joint venture which was incorporated in the United States but involves shared management (50% each),¹⁰⁵ and by other joint ventures that produce or manufacture the bulk of their products in a foreign country. In such cases, none of the tests would assess the true workings of the company or provide a fair result.

A literal reading of *Sumitomo* would permit a joint venture to claim the rights and immunities of the FCN Treaty, depending on its place of incorporation. Consequently, an American-based joint venture incorporated in Japan might be able to successfully invoke its protections and be free of the application of certain American labor laws regarding management executives.¹⁰⁶ Whether that would also lead to the absurd conclusion that the American partner in the joint venture could evade American labor laws is not likely but remains to be seen.¹⁰⁷

Although the Court in *Sumitomo* explicitly noted that it did not intend the place-of-incorporation test to grant superior rights to branches of Japanese companies operating in the United States than to locally incorporated Japanese subsidiaries, the former do retain certain jurisdictional or affirmative defense advantages.¹⁰⁸ Other issues remain unresolved.¹⁰⁹ First, it is unclear whether all

¹⁰⁵ See Nelson, *supra* note 85, at 647-51; Note, *The GM-Toyota Joint Venture*, *supra* note 83, at 705-11.

¹⁰⁶ Since the Toyota-General Motors joint venture was incorporated in the United States, it is subject to the rule of *Sumitomo* and is arguably free from certain American labor laws. The "control test," which considers a myriad of "signs of control," may be invoked to minimize the joint venture's discriminatory practices by obtaining jurisdiction over the joint venture. See Vagts, *supra* note 95, at 1544-45; Note, *Employment Rights*, *supra* note 96, at 1239 n.86.

¹⁰⁷ To avoid this result, a new test of corporate nationality for joint ventures has been proposed. This proposal calls for "lifting of the corporate veil" and applying a modified control test based on two factors—control of stock ownership and the joint venture's principal place of business. Note, *Employment Rights*, *supra* note 96, at 1242-47. See Recent Development, *Developing a Model Bilateral Investment Treaty*, 15 LAW & POL'Y INT'L BUS. 273 (1983) (discussing the "prototype bilateral investment treaty" which contains a clause that a party must have a "substantial interest" to receive the treaty's benefits).

¹⁰⁸ The Supreme Court in *Sumitomo* rejected the notion that its use of the place of incorporation test would "create a 'crazy-quilt pattern' in which the rights of branches of Japanese companies operating directly in the United States would be greatly superior to the right of locally incorporated subsidiaries of Japanese companies." 457 U.S. at 189. The Court explained that "[t]he only significant advantage branches may have over subsidiaries is that conferred by Article VIII(1)." *Id.* This advantage is the limited right to choose Japanese nationals for certain executive managerial positions.

¹⁰⁹ A tangential issue is *extraterritorial* jurisdiction: whether an American employer that did not hire employees for or rotate employees to a foreign affiliate because of the country's law or custom regarding race, sex, or religion may be held liable under American labor law for discrimination. This issue would pertain to an American-foreign joint venture, an American company, or a foreign employer with a United States incorporated subsidiary, all of which hire or rotate employees extraterritorially. See Edwards, *International Law and Employment Discrimination*, 8 OKLA.

United States labor laws will be interpreted in the same manner. For example, labor laws such as the National Labor Relations Act have been applied to foreign employers operating in the United States, including branches¹¹⁰ and wholly owned subsidiaries incorporated in the United States.¹¹¹ Likewise, American subsidiaries of Japanese companies have been found subject to United States antitrust laws.¹¹² These examples, however, did not involve bilateral friendship treaties and thus would seem subject to the *Sumitomo* analysis. Second, *Sumitomo* did not answer the question whether the parent can be liable as a "joint employer." Third, it is not clear whether the subsidiary can assert the defenses of its parent.

CITY U.L. REV. 1, 13-19 (1983); Kirschner, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 LAB. L.J. 394 (1983).

The leading case is *Bryant v. International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982). In *Bryant*, American citizens working for an American school in Iran claimed sex discrimination by the American employer under Title VII. The federal district court held that Title VII may be applied extraterritorially. 502 F. Supp. at 483. The court noted that Title VII specifically excludes from its coverage "aliens outside any State." Therefore, "[b]y negative implication, since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to non-aliens, i.e., American citizens, outside of any state by an employer otherwise covered by the Act." *Id.* at 482. See 42 U.S.C. § 2000e-1 (1982) for the current statute.

Other labor laws, however, have been held inapplicable. *See, e.g.*, *Zahourek v. Arthur Young & Co.*, 567 F. Supp. 1453 (D. Colo. 1983) (Age Discrimination in Employment Act), *aff'd*, 728 F.2d 607 (3d Cir. 1984); *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251 (D.N.J. 1983) (Age Discrimination in Employment Act); *GTE Automatic Elec., Inc.*, 226 N.L.R.B. 1222 (1976) (National Labor Relations Act); 29 U.S.C. § 213(f) (1982) (Fair Labor Standards Act specifically excludes extraterritorial application). *Cf. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 13 (1963) ("[T]he jurisdictional provisions of the [National Labor Relations] Act do not extend to maritime operations of foreign-flag ships employing alien seamen.").

A related issue is the possible liability of an American company in a joint venture with a foreign company which discriminates against American citizens abroad. Even if the American company is not liable as an employer, it may be liable as an employment agency of its foreign partner or affiliate. *Cf.* 2 EMPL. PRAC. GUIDE (CCH) ¶ 6857 (Sept. 16, 1985) (Commission had no jurisdiction over an American company located in the United States concerning the discriminatory practices of its parent company, which was incorporated in the United States but was operating abroad, because the subsidiary did not act as an employment agency of the parent.). If the American employer is separate from the foreign operation and not involved in any discrimination, then there would likely be no jurisdiction. *See id.*

¹¹⁰ *See In re Royal Bank of Canada*, 67 N.L.R.B. 403 (1946).

¹¹¹ *See Delta Match Corp.*, 102 N.L.R.B. 1400 (1953).

¹¹² *See, e.g., United States v. R.P. Oldham*, 152 F. Supp. 818 (N.D. Cal. 1957) (The court also held that the subsidiary could not invoke in its own right any rights under the FCN Treaty).

B. Liability of Parent and Availability of Defenses

A foreign parent corporation may be held liable for the activities of its wholly owned subsidiary when the parent so controls the subsidiary that the subsidiary is merely the agent or "instrumentality"¹¹³ of the parent, or when they can be viewed as an "integrated enterprise" and thus a single employer.¹¹⁴ Japanese companies, because of their traditional parent-child relationship, could be particularly vulnerable to this approach.¹¹⁵ "Parent liability" raises two business and legal questions: (1) When, if ever, does a subsidiary have standing to raise the rights and defenses of its parent? (2) How closely may a parent control its subsidiary's managerial and labor relations before becoming an "employer" and risking liability?

The United States Supreme Court in *Sumitomo* did not deal with the issue of whether a subsidiary may assert the rights of its parents.¹¹⁶ Prior to *Sumitomo*, however, at least one court permitted an American subsidiary of a West German parent company to raise the treaty immunities of its parent regarding the legality of import ban restrictions under a United States-West Germany treaty.¹¹⁷

¹¹³ *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181, 1184 (E.D.N.Y. 1979). The Equal Employment Opportunity Commission recently ruled that a foreign hospital may be designated an "employer" under Title VII of the Civil Rights Act of 1964, thereby granting the Commission jurisdiction over the hospital's American "employment agency." 2 EMPL. PRAC. GUIDE (CCH) ¶ 6853 (July 31, 1985).

¹¹⁴ This approach has been used under a variety of American labor laws: Title VII, *see, e.g.*, *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977)); and the National Labor Relations Act, *see, e.g.*, *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv. Inc.*, 380 U.S. 255 (1965). It is unclear whether "joint employers" will qualify under the National Labor Relations Act as jointly exempt if only one of them fits under a statutory exemption. *See Birenbaum, Joint Employer Exceptions Under the National Labor Relations Act: Will the Real N.L.R.B. Please Stand Up*, 24 SANTA CLARA L. REV. 371 (1984).

¹¹⁵ In *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y. 1981), a New York federal district court found jurisdiction against a Japanese multinational corporation where its wholly owned United States subsidiary essentially marketed goods manufactured in Japan. The court described the Japanese parent-subsidiary relationship as a hub of a wheel with many spokes. *Id.* at 1338 (citing M. WILKINS, *THE MATURING OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM 1914 TO 1970*, at 416 (1974)). *See Griffin, The Power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 LAW & POL'Y INT'L BUS. 375 (1974) (examines cases in which a local subsidiary and foreign parent are treated as a single entity for purposes of obtaining jurisdiction).

¹¹⁶ The Court noted, "We . . . express no view as to whether *Sumitomo* may assert any Article VIII(1) rights of its parent." 457 U.S. at 190 n.19.

¹¹⁷ *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 693 (9th Cir.) (On remand, the district court must assess the anticompetitive nature of the import restrictions in light of the treaty and its application to the foreign company and its American subsidiary.), *cert. denied*, 429 U.S. 940 (1976).

In *Spiess v. C. Itoh & Co. (America)*,¹¹⁸ however, a federal district court, in reference to the holding in *Sumitomo*, held that an American-based subsidiary may not assert the substantive treaty rights of its foreign parent.¹¹⁹ The subsidiary claimed that the Japanese staff who filled the positions in the United States was hired and trained by the parent in Japan. The subsidiary also claimed that, even though these Japanese employees were only temporarily rotated to the subsidiary, because of the "integrated relationship" of the parent and subsidiary, they were in reality employees of the parent company.¹²⁰ The court rejected this argument because the subsidiary was merely "attempting to accomplish indirectly what it [could not] accomplish directly."¹²¹

¹¹⁸ The federal district court's "opinion" is unreported. The court's order denying C. Itoh & Co. (America)'s Motion to Dismiss for Failure to State a Claim pursuant to FED. R. CIV. P. 12(b)(6) is reproduced in part in the opinion of the Fifth Circuit Court of Appeals. *Spiess v. C. Itoh & Co. (Am.)*, 725 F.2d 970, 973 (5th Cir. 1984) (appeal dismissed for want of appellate jurisdiction), *cert. denied*, 105 S. Ct. 115 (1984).

A summary of the relevant history of the litigation follows: *Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1 (S.D. Tex. 1979) (holding that the subsidiary, Itoh-America, is a company of the United States under the Japan FCN Treaty and can therefore claim no *direct* protection under the treaty), *rev'd*, 643 F.2d 353 (5th Cir. 1981) (holding that Itoh-America may directly assert rights under the Japan FCN Treaty and may hire executive personnel of its choice), *vacated*, 457 U.S. 1128 (1982) (vacated in light of *Sumitomo*). The Fifth Circuit then remanded to the district court for further consideration. 687 F.2d 129 (5th Cir. 1982). The district court entered its order on September 27, 1983, denying Itoh-America's motion to dismiss. *See Spiess*, 725 F.2d at 973. The Fifth Circuit then dismissed the subsequent appeal for lack of jurisdiction. *Id.* at 975. The United States Supreme Court denied certiorari. 105 S. Ct. 115 (1984).

¹¹⁹ The district court's order is quoted in *Spiess*, 725 F.2d at 973. The court ordered, in pertinent part, that:

The defendant, by contending that it has standing to assert the substantive treaty rights of its parent, is attempting to accomplish indirectly what it cannot accomplish directly. The Court does not believe that either the [Japan FCN] Treaty or the *Sumitomo* case would permit that to occur. Accordingly, defendant's motion to dismiss for failure to state a claim is denied *in toto*.

Id. (emphasis original). The district court had earlier expressed no opinion on the issue of whether a subsidiary may assert the treaty rights of its parent. *Spiess*, 469 F. Supp. at 8 ("[T]he question of whether Itoh-America has standing to raise Itoh-Japan's Article VIII(1) rights is of no moment. . . .").

¹²⁰ *Spiess*, 725 F.2d at 972 (quoting Itoh-America's brief). Itoh-America argued that:

As the Record shows, each member of the Japan staff has been hired and trained by the parent company in Japan. The parent company determines which positions with the subsidiary are to be filled with Japan staff, and selects the individuals to fill those positions. The parent company assigns these individuals to work for the subsidiary for a period of from three to five years. While in the United States, Japan staff compensation and promotions are determined by the parent. After completing their rotation in the United States, they return to Japan where they continue to work for the parent company.

Id. (quoting Itoh-America's brief).

¹²¹ *Id.* at 973 (quoting the district court's order dismissing Itoh-America's motion to dismiss).

At least some Japanese parent companies are willing to risk potential liability in arguing that they are "integrated employers" in order to hire and place their own rotating national employees in key American executive positions.¹²² On the other hand, this "integrated" relationship arguably could have the effect of establishing "standing" for the subsidiary. The American-based subsidiary by invoking the parent's standing as a "foreign employer" perhaps could benefit from or claim the parent's immunity from United States labor laws under the Japan FCN Treaty, at least vis-a-vis the rotating staff employees.¹²³ This is significant because this type of bilateral FCN Treaty is quite common; the United States presently has similar agreements with over twenty-four countries.¹²⁴

*Wickes v. Olympic Airways*¹²⁵ involved facts which differed from those in *Sumitomo* in three respects: the defendant Greek company was a "foreign corporation," not a wholly owned subsidiary incorporated in the United States; it was owned by the Greek government; and a state discrimination law was in question.¹²⁶ The Sixth Circuit Court of Appeals held that a provision of the United States-Greece FCN Treaty,¹²⁷ which was similar to Article VIII(1) of the Japan FCN Treaty, afforded the Greek company "a narrow privilege to discriminate in favor of Greek citizens" when hiring managerial and technical personnel in order to ensure the company's "operational success" in the United States.¹²⁸ The court held that although under the treaty Greek companies "are permitted to discriminate in favor of their own nationals or citizens for certain high level positions," they are not permitted "to discriminate against others in the labor force of the host country on any other basis."¹²⁹ The court also held that there

¹²² Cf. *id.* at 972 (argument by American subsidiary that it is "integrated" with the Japanese parent).

¹²³ See *Spies*, 643 F.2d at 358 (observing the incongruity if branches of Japanese companies were protected under the FCN Treaty but American subsidiaries of the same Japanese company were not).

¹²⁴ Note, *Commercial Treaties*, *supra* note 93, at 948.

¹²⁵ 745 F.2d 363 (6th Cir. 1984).

¹²⁶ *Id.* at 364.

¹²⁷ Treaty of Friendship, Commerce and Navigation, Aug. 3 & Dec. 26, 1951, United States-Greece, art. XII(4), 5 U.S.T. 1829, 1857, 1859, T.I.A.S. No. 3057 ("executive personnel . . . and other employees of their choice . . . regardless of their nationality").

¹²⁸ 745 F.2d at 368. The court noted, "Whether plaintiff has made out a valid claim of age discrimination, or national origin discrimination *not protected* by the Treaty, involves questions of fact for the District Court to resolve." *Id.* at 369 (emphasis added).

¹²⁹ *Id.* at 367. The Equal Employment Opportunity Commission recently held that when a foreign corporation is a representative of a foreign government it may be immune under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 (1982). In that instance, however, the corporation was conducting *commercial* activities, which is an exception to the general rule of immunity. The Commission therefore had jurisdiction over a foreign corporation which was the subject of a receptionist-switchboard operator's claim of racial and national origin discrimination.

was no conflict between the treaty and the state labor law because the state law did not prohibit the use of citizenship per se as a hiring criterion.¹³⁰

If the FCN Treaty applies and exempts a foreign corporation from application of United States labor laws, the issue of the definition of "executive" personnel becomes important. Case law does not provide a definitive answer.¹³¹ This is especially critical because studies show that Japanese companies tend to staff their American subsidiaries with more middle- and junior-level managers than most other multinational companies operating in the United States.¹³² Japanese companies, therefore, conceivably could avoid American labor laws if the term "executive" were defined broadly.

IV. DEVELOPING LEGAL AND PRACTICAL EMPLOYMENT LAW ISSUES

A. *Equal Employment Opportunity*

1. *Developing Agenda Items*

Sumitomo left unresolved many issues regarding the applicability of American labor laws to multinational companies operating in the United States. For example, it is unclear whether FCN treaties provide foreign incorporated companies doing business in the United States total immunity or only partial immunity limited to preferences based on citizenship, but not to preferences based on age, sex, or national origin, except where such employment decisions are part of the foreign companies' accepted practices.

While there is very little law on this issue, in *Wickes*, the Sixth Circuit held that the United States-Greece FCN Treaty provided only limited immunity to a Greek company: the company had "no license to discriminate against or among non-Greek citizens it hire[d] for positions not covered by the Treaty on the basis of race, sex, national origin, or any of the other factors prohibited by [state] law."¹³³ The *Wickes* approach creates the following "agenda item": (1)

2 EMPL. PRAC. GUIDE (CCH) ¶ 6852 (July 16, 1985).

¹³⁰ 745 F.2d at 368. The state law prohibited discrimination based on "religion, race, color, national origin, age, sex, height, weight or marital status." MICH. COMP. LAWS ANN.] 37.]2202(1)(a) (West 1984).

¹³¹ See, e.g., *Wickes*, 745 F.2d at 368-69 (The definition of "executive personnel" under the FCN Treaty would be determined by the United States Department of State and the regulations governing "treaty trader visas."). See *infra* note 134 for a discussion of treaty trader visas.

¹³² *Foreign Compliance*, *supra* note 78, at 32. See Greer & Shearer, *supra* note 80, at 45 (statistics showing use of *foreign*, not only Japanese, nationals in American subsidiaries).

¹³³ 745 F.2d at 369. In its analysis of the FCN Treaty, the *Wickes* court noted that its decision rested in part on the "juxtaposition of the words 'of their choice' and 'regardless of nationality' [which had] been interpreted by the State Department as creating both a right to employ and a limitation on that right." *Id.* at 367. It is perhaps significant that some of the other

whether this approach "waters down" treaty rights, and (2) whether it accords a proper balance between American social values prohibiting discrimination and the interests of foreign enterprises to maintain adequate control over their choice of personnel permitted under treaties and treaty trader visas.¹³⁴

If FCN treaties are inapplicable, then the question is how American labor laws will be applied and whether interpretations under them will take into account or be influenced by the foreign management and industrial relations which "come with the company."¹³⁵ Foreign companies traditionally send a

FCN Treaties have a slightly different wording. For example, the Japan FCN Treaty provides that "[n]ationals and companies . . . shall be permitted to engage . . . executive personnel . . . and other specialists of their choice." Japan FCN Treaty, *supra* note 99, art. VIII(1), 4 U.S.T. at 2070.

Other courts have also limited a foreign company's immunity. See, e.g., *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d at 558 (The court rejected the Japanese employer's argument that it should be exempt under the FCN Treaty from Title VII of the Civil Rights Act of 1964 as well as from other labor laws.); *Mattison v. Canon U.S.A., Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1685, 1686 (N.D. Ill. 1981) (The court noted in dictum that even if the FCN Treaty applied it would not provide a blanket exemption from Title VII.). Cf. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.) (The court permitted an exemption from Title VII for a religious organization's discrimination based on religion but did not extend the exemption to other bases unless the practice can be shown to be part of a proper religious preference), *cert. denied*, 409 U.S. 896 (1972).

¹³⁴ Under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(E) (1982), the term "immigrant" does not include "an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national." Such an "alien" may obtain a "treaty trader" visa by establishing that he will be

engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

22 C.F.R. § 41.40(a) (1985), 9 Foreign Affairs Manual, Part II, § 4.40 n.16 (1975). See also 22 C.F.R. § 41.41(a) (1985) (treaty investors).

The regulations further require that aliens seeking a trader visa must be employed by "an organization which is *principally owned* by a person or persons having the nationality of the treaty company." *Id.* § 41.40(a) (emphasis added). This regulation may place severe limits on Japanese-American joint ventures in their recruiting of foreign national executives in the United States because joint ventures, such as Toyota-General Motors, are often in a 50%-50% ownership split arrangement. It can be argued that these restrictions may not be controlling for Article VIII(1) of the Japan FCN Treaty since the Immigration and Nationality Act was enacted prior to the treaty. For a discussion of treaty trader and treaty investor visas under the Japan FCN Treaty, see Kanter, *The Japan-United States Treaty of Friendship, Commerce and Navigation: Lawyers as Treaty Traders*, 8 U. HAWAII L. REV. 343 (1986).

¹³⁵ In *Avigliano*, the Second Circuit noted that "as applied to a Japanese company enjoying rights under the . . . Treaty [the bona fide occupational qualification exception] must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States. . . ." 638 F.2d at 559.

nucleus of key personnel to the United States to establish and maintain operations.¹³⁶ This employment practice highlights other currently perplexing labor issues faced by foreign companies operating in the United States. For example, foreign employers face potential liability under the equal employment opportunity laws by rotating employees and by utilizing employment practices that may provide different economic and job security benefits to the rotating staff, policies of promoting from within, and job testing procedures emphasizing subjective characteristics. These practices tend to limit opportunities for American citizens, especially women, and are the "emerging agenda items" which must be addressed by multinational companies operating in the United States.

The Supreme Court in *Sumitomo* did not decide the appropriate application of anti-discrimination laws to foreign multinational companies operating in the United States.¹³⁷ It did, however, provide the legal framework: "There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country."¹³⁸ The issue is whether a foreign company "can support its assertion of a bona fide occupational qualification or a business necessity" because of such a requirement.¹³⁹ This issue poses a perplexing policy dilemma. On the one hand, it must be recognized that foreign companies may have unique requirements that can often be filled only by their nationals.¹⁴⁰ On the other hand, to permit and accommodate the discriminatory practices of foreign companies would be to allow them to define and compel the non-enforcement of United States labor laws.¹⁴¹

¹³⁶ For example, in 1977, Sumitomo Shoji America, Inc. employed about 464 people nationwide and over 200 people in its New York offices. Between 1975 and 1982, some 40-45% of the New York employees were "rotating staff." *Avagliano v. Sumitomo Shoji Am., Inc.*, 103 F.R.D. 562, 568, 569 & n.7 (S.D.N.Y. 1984). "Rotating staff" consists of personnel assigned by the parent company from Japan to the United States. These workers typically must obtain a treaty trader visa and be certified as "executive personnel" or "other specialists." See Note, *Employment Rights*, *supra* note 96, at 1241-43.

¹³⁷ 457 U.S. at 180 n.4.

¹³⁸ *Id.* at 189 n.19.

¹³⁹ *Id.* at 190 n.19.

¹⁴⁰ The Second Circuit noted that the Japan FCN Treaty must be construed to give weight to several "unique requirements of a Japanese company doing business in the United States": "(1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business." *Avigliano*, 638 F.2d at 559. *Accord* *Porto v. Canon U.S.A., Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981).

¹⁴¹ See *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981).

2. Determining Violations

Title VII of the Civil Rights Act of 1964 prohibits unlawful discrimination on the basis of "race, color, religion, sex, or national origin."¹⁴² In applying that law, courts must determine, first, whether a violation exists and, second, whether a defense exists.¹⁴³ The theory of alleged violation will usually determine the appropriate defense. If the court bases a violation on intentional discrimination (disparate treatment), to avoid liability the employer must successfully refute the facts or show the existence of a bona fide occupational qualification. If the court finds a violation in a neutral practice which has a disparate or adverse impact on persons protected under the law, to prevail the employer must refute the facts or show that such practice is necessary to its business.¹⁴⁴

A violation involving disparate treatment is established when the plaintiff provides sufficient evidence of prima facie (or presumptive) intentional discrimination (actual or inferred), such as proof of discrimination based on "race, color, religion, sex, or national origin."¹⁴⁵ The employer may rebut this charge by demonstrating a legitimate, non-discriminatory reason for the employment practice.¹⁴⁶ The plaintiff, who retains the ultimate burden of proof, may then attempt to show that the reason was merely pretextual.¹⁴⁷

In *Shiseido Cosmetics (America) Ltd. v. State Human Rights Appeal Board*,¹⁴⁸ a woman employee alleged that she was dismissed by her employer, a wholly owned subsidiary of a Japanese corporation, because of her national origin. She maintained that the employer's retrenchment policy at the executive level was discriminatory in that it did not result in a comparable termination of Japanese employees. A New York court held that the retrenchment policy was unrelated to the employee's national origin and implied that the employer had acted upon a legitimate business reason.¹⁴⁹ The court also held that there was "no signifi-

¹⁴² Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982).

¹⁴³ See Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 MICH. L. REV. 237, 248 (1984). See generally Comment, *The Multinational Corporation and Employment Discrimination: A Strategy for Litigation*, 16 U.S.F.L. REV. 491, 506-10 (1982) (examination of the liability of American companies operating in South Africa).

¹⁴⁴ The two defenses are distinguished in *Harris v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 674 (9th Cir. 1980).

¹⁴⁵ See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

¹⁴⁶ See *id.* at 577-78; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁴⁷ *Furnco*, 438 U.S. at 578; *McDonnell Douglas*, 411 U.S. at 804-05. See generally Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1161 (1980) (arguing that courts should impose on employers "more than a minimal requirement to produce some evidence of nondiscrimination").

¹⁴⁸ 72 A.D.2d 711, 421 N.Y.S.2d 589 (1979).

¹⁴⁹ *Id.* at —, 421 N.Y.S.2d at 590.

cance" to the fact that the Japanese employees were not dismissed because

the Japanese were in reality employees of the parent corporation assigned to an American subsidiary for varying periods of time as part of a rotation program of a familiar kind. The failure to dismiss such employees does not support the conclusion that a discriminatory policy was being pursued against Americans based on their national origin.¹⁵⁰

A violation involving disparate or adverse impact is established when the plaintiff shows that an otherwise neutral employment rule or practice operates disproportionately on persons protected by Title VII, so as to exclude them from employment opportunities.¹⁵¹ The employer may defend by proving that the practice was based on "business necessity."¹⁵² The plaintiff may rebut this defense by demonstrating that the employer had other reasonable and equally effective alternatives with less discriminatory impact.¹⁵³

Case law involving Title VII discrimination by multinational companies in

¹⁵⁰ *Id.* at ____, 421 N.Y.S.2d at 591. There is no indication in the very brief opinion why the complainant did not also raise a theory that the rotation policy was a neutral policy with an adverse impact. The court did not attempt to show that the employer based its decision on a rotation policy which preferred Japanese nationals, nor did the court reveal whether it considered the rotating employees as joint employees of the wholly owned subsidiary. Although complainant's position was filled by a Japanese national with over 20 years of service with the company, the issue of seniority was not addressed. *Id.* at ____, 421 N.Y.S.2d at 590. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 355-56 (1977) (holding that seniority preference not based on racial discrimination was lawful).

The New York court concluded that "following this program of retrenchment, the reduced staff continues to disclose a significant participation by Americans, some of them in high policy-making positions." 72 A.D.2d at ____, 421 N.Y.S.2d at 591. This "bottom-line" defense—the argument that if the end result of an employment practice is nondiscriminatory, then the practice is lawful—has been rejected by the United States Supreme Court. *Connecticut v. Teal*, 457 U.S. 440 (1982) (Title VII case dealing with job promotion examinations that discriminated against blacks and was not job-related).

¹⁵¹ *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Equal Employment Opportunity regulations provide in pertinent part:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will *generally* be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. § 1607.4D (1985) (emphasis added). On the question of proving violations, see *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 45 (1977) (proposes a model based on "general skill jobs versus specialized skill jobs, and specific employment requirements versus a subjective employment process").

¹⁵² *Griggs v. Duke Power Co.*, 401 U.S. at 432. See *infra* text accompanying notes 208-16.

¹⁵³ See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

the United States is sparse. Courts have yet to decide the substantive legality of foreign companies giving alleged preferences to their own citizens to the disadvantage of American citizens, especially women.¹⁵⁴ Therefore, the present state of the law regarding this "agenda item"—foreign companies basing employment decisions on citizenship—is far from resolved.

In the leading case of *Espinoza v. Farah Manufacturing Co.*,¹⁵⁵ the United States Supreme Court held that Title VII's ban on national origin discrimination did not cover discrimination based on citizenship.¹⁵⁶ More specifically, the Court held that Title VII did not proscribe discrimination based on "alienage";¹⁵⁷ rather, the national origin provision refers "to the country where a person was born, or, more broadly, the country from which his or her ancestors came" and not to citizenship.¹⁵⁸ The Court did find, however, that a citizenship hiring preference could violate the national origin provision if it were pretextual and "part of a wider scheme of unlawful national-origin discrimination."¹⁵⁹

Courts generally have interpreted *Espinoza* literally, holding that discrimination based on citizenship alone cannot be the basis for national origin discrimination.¹⁶⁰ Therefore, if a Japanese multinational company operating in the United States imposed a strict citizenship requirement, the courts might be receptive to its argument that no violation occurred. This conclusion would be bolstered if the facts showed that all non-Japanese citizens, regardless of their

¹⁵⁴ See, e.g., *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506 (S.D.N.Y. 1979) (charge of sex and national origin discrimination not fully addressed since decision hinged on treaty issues), *modified*, 638 F.2d 552, 558 (2d Cir. 1981) (The FCN Treaty does not exempt Japanese companies from Title VII but "does not give them license to violate American laws prohibiting discrimination in employment."), *vacated*, 457 U.S. 176 (1982); *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979) (A United States citizen sued a Danish corporation and its American subsidiary claiming his discharge was based on age and his American citizenship. The court permitted the case to proceed but developed no substantive law.); *Spiess v. C. Itoh & Co. (Am.)*, 469 F. Supp. at 9 (The court implied that defendant may be found in violation of Title VII when it denied defendant's motion to dismiss.). See generally Sethi & Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?*, 4 EMPLOYEE REL. L.J. 485 (1979) (analysis of the issues in the then pending *Spiess* case); Note, *Beyond the FCN Treaty: Japanese Multinationals Under Title VII*, 51 FORDHAM L. REV. 871 (1983) (explaining that the legality of the management practices of Japanese subsidiaries in the United States is unsettled).

¹⁵⁵ 414 U.S. 86 (1973).

¹⁵⁶ *Id.* at 95.

¹⁵⁷ *Id.* at 95-96.

¹⁵⁸ *Id.* at 88.

¹⁵⁹ *Id.* at 92. Accord 29 C.F.R. § 1606.5(a) (1985) ("where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited under Title VII").

¹⁶⁰ See, e.g., *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Vicedomini v. Alitalia Airlines*, 33 Empl. Prac. Dec. (CCH) ¶ 34,119 (S.D.N.Y. 1983).

nationality or ancestry, were treated similarly and that the Japanese employer was seeking to insure that executives were familiar with business and cultural practices for legitimate business reasons.

The Equal Employment Opportunity Commission (Commission) guidelines go further and include as a violation employment practices based on "cultural or linguistic characteristics of a national origin group."¹⁶¹ To some, however, there may be a significant difference between an *American* and a *foreign* citizenship requirement. For example, one author suggests that the latter requirement may be a per se national origin violation:

A citizenship requirement, while perhaps providing employers with a shortcut to select qualified applicants, is unnecessarily concerned with *how* the applicant came to possess knowledge of Japanese business and culture, *i.e.*, being born into and growing up in the Japanese culture, rather than with whether the applicant *actually has* such knowledge. The citizenship requirement, therefore, is largely based on an accidental part of a person's life and unnecessarily excludes Americans with the requisite business and cultural familiarity.¹⁶²

At least one court appears to have adopted this more restrictive view of the citizenship requirement and has rejected a Japanese employer's argument "that discrimination on the basis of national citizenship, as opposed to national origin, was not prohibited by Title VII."¹⁶³

Moreover, in *Thomas v. Rohner-Gebrig & Co.*,¹⁶⁴ an Illinois federal district court held that an apparent citizenship discrimination complaint may be characterized as a national origin complaint in order to survive a motion to dismiss. Plaintiffs alleged that they were discharged by their employer, a Swiss-owned company incorporated in New York, because they were native born Americans. The company filled their positions with Swiss and German born employees. The employer moved to dismiss the complaint contending that the ban on national origin discrimination under Title VII was limited to "a person's ancestry, heritage, background, or possession of characteristics which are typically identified with ancestral groups," and did not limit discrimination based on "place of birth."¹⁶⁵ The court denied the motion to dismiss, citing *Espinoza*, and held

¹⁶¹ 29 C.F.R. § 1606.1 (1985).

¹⁶² Note, *Yankees Out of North America*, *supra* note 143, at 245-46 (emphasis original) (footnote omitted).

¹⁶³ It appears that the federal district court did not address this issue in its written opinion in *Avigliano*, 473 F. Supp. 506 (S.D.N.Y. 1979). The Supreme Court, however, observed that "Sumitomo argued in the District Court that discrimination on the basis of national citizenship, as opposed to national origin, was not prohibited by Title VII. The District Court disagreed, however." *Sumitomo*, 457 U.S. at 180 n.4.

¹⁶⁴ 582 F. Supp. 669 (N.D. Ill. 1984).

¹⁶⁵ *Id.* at 672-74.

that national origin does refer to the country where a person or his ancestors were born. The court held that an employer who discriminated against an applicant or employee merely because he was "American born" could be in violation of Title VII.¹⁸⁶

There seems to be a tendency for Japanese employers to give job preferences to nationals, especially to those nationals who are male. This employment practice and the widely used policy of "promoting from within" will have an adverse impact on American women, screening them from job opportunities at a rate disproportionate to men. It may be possible to show that the Japanese employer's use of citizenship as an employment criterion is pretextual and really a policy designed to exclude American citizens, especially women, from managerial and executive positions, thereby violating the sex or national origin provision of Title VII.

In the author's opinion, Japanese employers who favor nationals are violating Title VII although exculpatory defenses may exist. Nationality discrimination can be a not-too-disguised form of national origin preference in that it is closely tied to reliance on "expediency" and "stereotype assumptions" about who possesses or lacks job qualifications regarding the language, customs, and business practices of Japan. This, combined with the inevitable wholesale national origin inclusionary preference for those of Japanese ancestry due to Japan's homogeneous population,¹⁸⁷ adversely impacts on Americans because of their race, sex, and national origin. Nationality discrimination also might be viewed as pretextual in that Japanese employers merely seek a more efficient method of identifying candidates who generally possess company or country knowledge (*shosha*). Such employment practices may violate Title VII under either a disparate treatment or an adverse impact theory. The latter, however, is more likely the easier to prove.¹⁸⁸

Other Japanese employment practices also tend to create potential violations under Title VII and, therefore, require appropriate attention. These practices include providing different economic and job security benefits to the predominantly Japanese rotating staff, promoting from within, and requiring Japanese

¹⁸⁶ *Id.* at 675. See also *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979).

¹⁸⁷ Statistics show that more than 99% of Japan's population is of Japanese origin. D. WHITAKER, P. JUST, J. MACDONALD, K. MARTINDALE, J. RECORD, R. SHINN, C. TOWNSEND & N. VREELAND, *AREA HANDBOOK FOR JAPAN* 70 (3d ed. 1974).

¹⁸⁸ In proving disparate impact, the portion of the employer's workforce chosen for comparison (executives versus a larger pool of workers) is quite crucial. The law, however, is beginning to develop a fairly good standard of predictability on this point. See *Connecticut v. Teal*, 457 U.S. 440 ("bottom line" percentages of blacks and whites promoted does not justify discrimination); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (An employer's restriction of company wages and ownership benefits to family or close friends of present owners, all of whom are of Italian ancestry, has an adverse impact on employees of other national origins or races and is a violation of Title VII.), *cert. denied*, 104 S. Ct. 3533 (1984).

language skills.

Job testing by Japanese multinationals also must be re-examined in light of Title VII requirements. The Japanese selection process involves a detailed investigation into an applicant's personal life in order to determine if the applicant would be compatible with company goals and in "harmony" with the present work force. One commentator described this selection process as

a checklist approach, including schooling, family background, and other factors which ensure that the person will "fit in" to the corporation. This is extremely important since the company and the employee expect the employment to last a lifetime. Japanese also approach promotions much differently than American firms. Years of service is the basic criterion used for salary determination, not the quality or quantity of work.¹⁶⁹

When hiring high level employees, Japanese companies in the United States often do not utilize general job descriptions but hire on the basis of subjective factors such as position requirements and prior experience.¹⁷⁰ At the "work floor" level, Japanese employers may also utilize subjective factors in hiring employees, often American workers, who will perform "flexible job duties."¹⁷¹

This emphasis on compatibility and other subjective factors and the absence of any formal job description is a legal quagmire inviting litigation under Title VII. Japanese employers often will have problems justifying why applicants or employees were distinguishable for purposes of receiving benefits and opportunities and how their screening devices were job-related.¹⁷² The lack of standards to measure worker qualification and performance will inevitably lead disgruntled employees to feel that their job benefit or opportunity is less than it should

¹⁶⁹ Hiller, *Civil Rights Enforcement and Japanese Subsidiaries*, 21 AM. BUS. L.J. 463, 470-71 (1984).

¹⁷⁰ Sumitomo Shoji testified that for the "few executive, managerial, and sales positions" which it fills, it "does not have or utilize any generally applicable written criteria, but instead fills such positions based on the particular requirements of each position" and that the "most important criterion is relevant prior experience." *Avagliano*, 103 F.R.D. at 569 (quoting Defendant's Supplemental Answers and Objections to Plaintiffs' Interrogatories at 3).

¹⁷¹ For example, Sumitomo Shoji "maintains no job descriptions for any of the twenty-one job titles in the company." *Avagliano*, 103 F.R.D. at 568-69.

¹⁷² See *Kraszewski v. State Farm Gen. Ins. Co.*, 38 Fair Empl. Prac. Cas. (BNA) 197 (N.D. Cal. 1985). In *Kraszewski*, the employer's job selection procedures were not shown to be job related, predictive of, or correlated to important elements of job behavior necessary to safe and efficient job performance. The employee had relied on multiple subjective criteria which had a disparate impact on women. But see *Reilly v. Califano*, 537 F. Supp. 349 (N.D. Ill.) (upholding employer's use of the subjective factor of "personality" in hiring an applicant with a lower evaluation "ranking" than plaintiff), *aff'd mem.*, 673 F.2d 1333 (7th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

be.¹⁷³ At least one author, however, has suggested that courts have been reluctant to apply the same rigorous standards for job discrimination against executive employees as against blue-collar employees and that relatively few cases regarding executive discrimination are brought.¹⁷⁴

An alternative basis for liability is found under section 1981 of the Civil Rights Act of 1866,¹⁷⁵ which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."¹⁷⁶ The United States Supreme Court has held that this provision applies to private employment discrimination¹⁷⁷ and prohibits discrimination against whites as well as non-whites.¹⁷⁸ Courts have also expanded the term "white citizens" to protect not only blacks and whites, but also Hispanics and Asian-Americans.¹⁷⁹

It is still unsettled, however, whether decisions protecting Hispanics and Asian-Americans protect against discrimination based on national origin or race.¹⁸⁰ Some courts have held that discrimination on the basis of national origin does not violate section 1981.¹⁸¹ Other courts have held that section 1981

¹⁷³ These employees may not complain if the Japanese managerial approach of promoting harmony in the work place actually displaces the American tendency to seek vindication of rights, often through litigation.

¹⁷⁴ Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 948-50 (1982).

¹⁷⁵ 42 U.S.C. § 1981 (1982).

¹⁷⁶ *Id.*

¹⁷⁷ *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (availability of 42 U.S.C. § 1982, which governs right to real and personal property, to private discrimination).

¹⁷⁸ *McDonald v. Santa Fe*, 427 U.S. 273, 296 (1976) (law applies to whites and non-whites). *See also Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (holding that rights under 8 U.S.C. § 41, which is now codified at 42 U.S.C. § 1981, protects aliens to the same extent as citizens).

¹⁷⁹ *See, e.g., Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) (Hispanic). *Cf. Bullard v. Omni Ga., Inc.*, 640 F.2d 632 (5th Cir. 1981) (preference for Orientals over whites is race and perhaps national origin discrimination). It seems clear, however, that § 1981 does not protect sex discrimination, *see, e.g., New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 377 F. Supp. 481, 487 (S.D.N.Y. 1974) (dictum) (42 U.S.C. § 1981 does not apply to sex discrimination, only to persons denied rights as "white citizens."), *rev'd on other grounds*, 512 F.2d 856 (2d Cir. 1975); or to religious discrimination, *see, e.g., Manzanares*, 593 F.2d at 971; *Khawaja v. Wyatt*, 494 F. Supp. 302, 304 (W.D.N.Y. 1980).

¹⁸⁰ *See Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. at 671 n.4. *See also Shah v. Mt. Zion Hosp. & Medical Center*, 642 F.2d 268 (9th Cir. 1981) (§ 1981 does not protect "Caucasian" citizens against national origin discrimination); *Khawaja v. Wyatt*, 494 F. Supp. 302 (unclear whether § 1981 is founded on national origin, alienage, or race).

¹⁸¹ *See, e.g., Ben-Yakir v. Gaylinn Assocs.*, 535 F. Supp. 543 (S.D.N.Y. 1982); *Kurylas v. United States Dep't of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974) (allegation of national origin does not state a cause of action), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975).

will apply when national origin discrimination is motivated by or indistinguishable from racial discrimination.¹⁸² Under this approach the distinction between race and national origin is not always clear in that "[b]oth classifications have the effect of excluding Caucasians and blacks from employment."¹⁸³

This may lead to lawsuits brought by American citizens under claims of "reverse" discrimination based on race and national origin. In *Thomas v. Rohner-Gehrig & Co.*,¹⁸⁴ however, an Illinois federal district court denied a discharged employee's section 1981 "reverse" discrimination claim which was based on his being replaced by Swiss and German nationals who were Caucasian. The court concluded that there was insufficient evidence of racial discrimination when whites replace whites.¹⁸⁵ This raises the interesting question whether the result in *Thomas* might have been different if the replaced employee had been Oriental rather than Caucasian. The federal district court in *Avigliano v. Sumitomo Shoji America, Inc.*¹⁸⁶ tangentially addressed this issue. The court considered the race and national origin claims in a section 1981 cause of action to be intertwined. The court nevertheless rejected the section 1981 claim because one of the plaintiffs was a Japanese national and an action was already available under Title VII.¹⁸⁷

Courts may be receptive to section 1981 claims by American citizens alleging discrimination by multinationals based on citizenship, national origin, and alienage, especially when such discrimination is intertwined with or characterized as "race" discrimination. This is one "agenda item" that should be watched closely as section 1981 does not contain the statutory defenses of Title

¹⁸² See, e.g., *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901 (W.D. Okla. 1977) (Mexican-American can bring claim of racial discrimination); *Cubas v. Rapid Am. Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) (Cuban-born naturalized citizen). Cf. *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186 (D. Md. 1977) (unsupported allegation that plaintiff was a Hispanic male did not establish racial discrimination).

¹⁸³ Gray, *The National Origin BFOQ Under Title VII: Limiting the Scope of the Exception*, 11 EMPLOYEE REL. L.J. 311, 313-15 (1985) (analyzing race and national origin in the Title VII context and the BFOQ exception under Title VII after the Supreme Court's *Sumitomo* decision). Gray urges that national origin discrimination be considered more closely akin to racial discrimination because classifications based on race or national origin converge. "For example, an employment practice of hiring only Japanese nationals converges with a practice of hiring only members of the Oriental race." *Id.* at 313. See *Bullard v. Omni Ga., Inc.*, 640 F.2d 632 (preference for those with Oriental heritage over whites and blacks is racial discrimination and possibly national origin discrimination).

¹⁸⁴ 582 F. Supp. 669 (N.D. Ill. 1984).

¹⁸⁵ *Id.* at 672. The court held, however, that a Title VII national origin violation may be proven. See *supra* text accompanying notes 164-66.

¹⁸⁶ 473 F. Supp. 506 (S.D.N.Y. 1979), *modified*, 638 F.2d 552 (2d Cir. 1981), *vacated*, 457 U.S. 176 (1982).

¹⁸⁷ 473 F. Supp. at 514.

VII.¹⁸⁸3. *Availability of Defenses*

Two primary defenses are available under Title VII: (1) the statutory bona fide occupational qualification (BFOQ) defense, which permits intentional discrimination on the basis of religion, sex, or national origin when it is "reasonably necessary to the normal operation of that particular business or enterprise";¹⁸⁹ and (2) the judicially created "business necessity" defense which permits discrimination even when it has an adverse impact on employees, unless a reasonable alternative exists.¹⁹⁰ This section deals with the effect these legal defenses may have on the business practices of foreign companies operating in the United States, including preference for nationals in executive positions, often as part of a "rotating staff," their policies of promoting from within, and testing procedures.

a. *BFOQ Defense*

The broad issue is whether foreign companies incorporated and operating in the United States should be permitted to retain business systems which otherwise would be found to violate American labor laws. The narrower issue is whether the discriminatory business practice, such as preference for nationals, is reasonably necessary to the normal operation of the employer's business. The BFOQ exception provides a statutory basis for intentional discrimination which accommodates legitimate business needs that go to the "essence" of the business.¹⁹¹ Although the United States Supreme Court has indicated that this exception is limited,¹⁹² recent Commission decisions have demonstrated a grow-

¹⁸⁸ See *infra* text accompanying notes 189-216 for a discussion of the statutory defenses under Title VII.

¹⁸⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1982). See *Sumitomo*, 457 U.S. at 189 n.19 (Some positions in a Japanese company operating in the United States "call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country."); Gray, *supra* note 183, at 311-20; Note, *Yankees Out of North America*, *supra* note 143, at 249-53.

¹⁹⁰ See *Dothard*, 433 U.S. at 331-32 & n.14; *Griggs*, 401 U.S. at 432.

¹⁹¹ *Dothard*, 433 U.S. 321. See also *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 n.5 (5th Cir. 1969) (dictum). Mere increased administrative efficiency, however, is not usually an adequate basis. See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

¹⁹² The Supreme Court noted that "the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Dothard*, 433 U.S. at 334 (The Court, however, held that being male is a BFOQ for a job as a counselor in a male maximum-security penitentiary.). See Recent Development, *Dothard v. Rawlinson: Misap-*

ing sensitivity to foreign business practices.¹⁹³

Whether the Japanese can maintain their practice of utilizing a rotating staff depends on their ability to show that the practice is central and necessary to the essence of the business, "not merely tangential."¹⁹⁴ Japanese companies operating in the United States are often part of a general trading company (*sogo shosha*); executive employees (frequently "lifetime" employees) working for these companies are trained in Japan and abroad.¹⁹⁵ These employees "rotate" through the subsidiaries to gain a better understanding of the parent company and to serve its needs. Under this rotation system, the parent company retains control and protects its investment. At times the managerial rotating staff can reach a fairly large percentage of the total staff of the American subsidiary.¹⁹⁶

One of the first inquiries is what attributes "all or substantially all" Japanese nationals have that American citizens do not. Japanese nationals are likely to be familiar with Japanese language, customs, and interpersonal relations. They perhaps have insights into Japanese business practices, including knowledge of the product line, the central management structures, and company operations. They may fit in more easily and deal more effectively with the home office and the personnel of other Japanese subsidiaries.

It is debatable whether Japanese nationals possess all these attributes; whether some non-Japanese might possess more of them; and at what level—executive, managerial, technical, or sales—these attributes are significant. The burden of proving BFOQ as an affirmative defense lies on the employer and, although it has been suggested that BFOQ should be presumed,¹⁹⁷ the Commission and the courts will more likely approach the question on a case-by-case basis.

plication of the Bona Fide Occupational Qualification Defense, 22 ST. LOUIS U.L.J. 197, 218-26 (1978) (criticizing the Court in *Dothard* for upholding the BFOQ exception in the absence of concrete evidence).

¹⁹³ This sensitivity was perhaps presaged by the Commission's amicus curiae brief to the Fifth Circuit in *Spieß v. C. Itoh & Co. (Am.)*. The Commission raised the possibility that the BFOQ exception would be "broad enough to encompass any rights that Japanese corporations legitimately could assert under the Treaty." 643 F.2d at 361.

¹⁹⁴ See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d at 388-89. In determining the "essence" of the business, the Second Circuit emphasized that executive "positions" reasonably necessary to the "successful operation" of the business would be considered. *Avigliano*, 638 F.2d at 559 (emphasis added). The Fifth Circuit emphasized the importance of "control." *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d at 360-61.

¹⁹⁵ See *Krause & Sekiguchi*, *supra* note 81, at 389.

¹⁹⁶ For example, in *Sumitomo Shoji Kaisha, Ltd.*, one of Japan's largest trading companies, some 40-45% of the New York staff were part of the rotating staff. *Avagliano*, 103 F.R.D. at 569. Other large trading companies include *C. Itoh & Co.*, *Nichimen Co.*, *Mitsubishi Corp.*, *Nissho Iwai Co.*, *Marubeni Corp.*, *Toyo Menka Kaisha Ltd.*, *Mitsui & Co.*, and *Kanematsu-Gosho Ltd.* See *Wiegner, Outward Bound*, *FORBES*, July 4, 1983, at 96, 97.

¹⁹⁷ See Note, *Yankees Out of North America*, *supra* note 143, at 249-53.

A second inquiry is whether discrimination based on these culture-based attributes is "reasonably necessary" to the operation of the Japanese company's business. Although precedent dealing with Japanese companies is lacking, the following discussion and cases addressing other foreign companies may provide some insight by way of analogy. In sex discrimination cases, courts repeatedly have held that women may not be denied job opportunities based on inaccurate stereotypes and misconceptions about the general abilities of women.¹⁹⁸ If a factual basis for discrimination exists, however, it may be upheld. For example, the Commission recently held that an American employer operating extraterritorially could discriminate on the basis of sex on account of a foreign country's laws, customs, and refusal to grant an entry visa.¹⁹⁹ The Commission cautioned, however, that the "employer must have a current, authoritative, and factual basis for its belief, and it must rely upon that belief in good faith."²⁰⁰ In *Kern v. Dynallectron Corp.*,²⁰¹ a Texas federal court held that religion was a BFOQ for pilots when the foreign laws of the host country provided that "non-Muslims flying into Mecca," if caught, would be beheaded.²⁰² A foreign multinational employer operating in the United States may also assert by analogy that it is necessary to adhere to its own customs and practices regarding citizenship, sex, or religious discrimination.

A national origin BFOQ exception could exist if national origin closely correlated with the legitimate needs of the business, including familiarity with business operations and cultural skills.²⁰³ A Japanese employer's argument for a BFOQ exception would seem strongest on business and cultural familiarity requirements and weakest on pure citizenship because it stereotypes knowledge of business and culture based on the accident of birth.

¹⁹⁸ See, e.g., *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971). Cf. *Rosen v. Public Serv. Elec. & Gas Co.*, 328 F. Supp. 454 (D.N.J. 1970) (employer's pension plan could not permit retirement at different ages and lengths of service for men and women), *rev'd on other grounds*, 477 F.2d 90 (3d Cir. 1972).

¹⁹⁹ 2 EMPL. PRAC. GUIDE (CCH) ¶ 6851 (July 16, 1985) (An American employer in a foreign country denied employment to a female applicant for a job as an air traffic controller due to the country's customs and laws regarding working women.). The Commission emphasized that it will closely examine the facts of each case to determine whether the reasons given by the employer satisfy the Commission's standards. However, it is the Commission's view that the employer cannot rely upon mere conjecture upon the policies of the foreign country or upon stereotypical views of the individual's class.

Id. ¶ 6851, at 7055. Although the case involved a "business necessity" test, it could easily have involved a BFOQ defense if the employer proved that "all or substantially all" women could not perform the task. See *id.* ¶ 6851, at 7055 n.2.

²⁰⁰ *Id.* ¶ 6851, at 7054.

²⁰¹ 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (8th Cir. 1984).

²⁰² 577 F. Supp. at 1201.

²⁰³ For a list of skills and traits which Japanese companies operating in the United States require, see *supra* note 140.

Other related case law has primarily involved attempts by American employers to use "customer preference" as a defense to national origin and sex discrimination. These attempts generally have failed.²⁰⁴ Some BFOQ's, however, have been found where foreign custom or laws limited a United States employer's ability to refrain from discriminating for particular jobs that were located in a foreign country.²⁰⁵ In addition, the Commission may be signaling that some cases go beyond mere customer preference and involve foreign policies, customs, practices, and law which might need to be accommodated for United States employers operating abroad²⁰⁶ and perhaps by analogy for multinationals operating in the United States.

Finally, a foreign employer may be able to use language skills as a BFOQ defense to national origin discrimination. While an employer who attempts to impose foreign language requirements may face legal obstacles, the law recognizes that there may be legitimate business justifications for such discrimination.²⁰⁷ Certain jobs may entail continual contact with home offices or other

²⁰⁴ See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (rejecting as a defense the preference of American airline customers to have women stewardesses); *American Jewish Congress v. Carter*, 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959) (rejecting as a BFOQ an American employer's attempt to placate a Saudi Arabian customer by not hiring women for its New York office), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (1960), *aff'd*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961).

Cf. Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981). The *Fernandez* court held that being male is not a BFOQ for a position in a company that does business in foreign countries where customers refuse to do business with females. *Id.* at 1276-77. The court, however, found that sex was not a factor in the employer's refusal to promote the female employee. *But see Ward v. Westland Plastics, Inc.*, 651 F.2d 1266 (9th Cir. 1980). In *Ward*, the customer, at the last moment, requested that other females be prohibited from attending the business lunch. The management, therefore, barred a female employee from attending. The court noted that, in this situation, the actions of management were "not to accommodate a buyer's sexist preference," but were merely "to avoid potential embarrassment to itself and to the individuals involved." *Id.* at 1269.

²⁰⁵ See, e.g., *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (religious BFOQ).

²⁰⁶ *Cf.* 2 EMPL. PRAC. GUIDE (CCH) ¶ 6851 (July 16, 1985) (foreign laws and customs considered when hiring air traffic controller). *But cf.* 2 EMPL. PRAC. GUIDE (CCH) ¶ 6857 (Sept. 16, 1985) (American citizens working for American companies abroad are protected by American labor laws.).

²⁰⁷ Similarly, courts have held that denial of employment based on the applicant's inability to speak English, if job-related, is not "national origin" discrimination. See, e.g., *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (English-speaking rule was based on a legitimate business reason), *cert. denied*, 458 U.S. 1122 (1982); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (no violation of rights; state's requirement of English rationally related to legitimate objective). The Commission guidelines permit employers to require that employees speak only English at certain times, but only if "the rule is justified by business necessity." 29 C.F.R. § 1606.7 (1985). See generally Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MAR. L. REV. 667 (1982) (discussing language

foreign subsidiaries and suppliers and, therefore, may require a grasp of foreign language. Whether employers can use national origin or citizenship to screen for language facility depends on the employer's ability to provide a convincing statistical basis for its conclusion.

The BFOQ defense raises two "agenda items" for future resolution. First, should foreign companies operating in the United States be allowed to use their own business practices and customs as a basis for preferring home country employees? In resolving this policy issue, American decision-makers must consider whether, without such an exception, traditional and unique Japanese business practices and their efficient and profitable United States enterprises will "wither and die" and whether Japanese trade and direct investment in the United States may also be affected.

Second, what are the parameters of the BFOQ defense? Will the breadth of the exception include only national origin differentiation and exclude sex, race, and religion grounds for unlawful discrimination? Will it include managerial, supervisory and executive personnel as well as lower level executives and specialists or only those in the higher echelon? Finally, what level of proof will be required to show the relationship of a BFOQ to the various skills?

b. Business Necessity Defense

The judicially created "business necessity" defense²⁰⁸ permits intentional or neutral discrimination when necessary for a safe and efficient operation of the business and when no reasonable alternatives are available.²⁰⁹ There is no authoritative case law involving foreign multinationals in the United States and their use of this defense.

Discrimination by foreign multinationals based solely on citizenship probably will not be upheld under this defense because such discrimination likely will be seen merely as a means of using stereotypes to indirectly obtain business and cultural familiarity. The defense of "business necessity" probably will also fail because there are reasonable alternatives to identify job skills, such as job tests and interviews. For example, a Japanese language requirement might be necessary to the business because employees must properly communicate with the home office,²¹⁰ but Americans as well as Japanese could meet this requirement.

requirements and the BFOQ and business necessity defenses).

²⁰⁸ *Griggs v. Duke Power Co.*, 401 U.S. at 431-32.

²⁰⁹ See *Dothard v. Rawlinson*, 433 U.S. at 331 n.14; Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979). See also *Leftwich v. United States Steel Corp.*, 470 F. Supp. 758, 765 (W.D. Pa. 1979) ("Good business management or job efficiency are recognized defenses to Title VII claims" and may be supported by proof of the employee's excessive errors and tardiness.).

²¹⁰ See Comment, *Language Discrimination*, *supra* note 207, at 687-91. Cf. 29 C.F.R. §

Therefore, foreign language proficiency could be achieved without a citizenship requirement by adequate testing.²¹¹

The foreign employer is more likely to prevail if job requirements necessitate familiarity with foreign business, managerial, and cultural practices and if the resulting adverse impact on American citizens from its selection of a large percentage of foreign nationals is purely incidental, without reasonable alternatives. It has been argued that the differences between Japanese and American cultures require Japanese trading companies to hire Japanese nationals or face the high costs that accompany the training of American applicants. Japanese nationals come equipped with the knowledge of the structure and needs of trading companies; Americans do not.²¹²

A possible weakness in the business necessity defense could be the apparent absence of the first part of the requirement that the exclusion be reasonably necessary to the "safe and efficient" operation of the business. While increased efficiency is almost always considered, safety seems to be displaced by the desired goal of "better chance for profitability."

Several "agenda items" regarding the business necessity test await resolution. It is unclear for what category of employees the defense is valid and whether it shields discrimination based just on national origin and not consequential discrimination based on other factors, such as sex. In addition, it remains to be seen whether training American workers is a reasonable alternative and whether other equally effective employment practices with fewer discriminatory effects exist. Some of these issues are presently being tested in *Avagliano v. Sumitomo Shoji America, Inc.*²¹³ The employer had referred to personnel assigned from the Japanese parent to the American subsidiary as "rotating staff" and to local em-

1606.7 (1985) (Speak-English-only rules may be allowed if there is a "business necessity."). *But cf.* *Saucedo v. Brothers Well Serv., Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979) (Absent "business necessity," rules requiring that only English be spoken are impermissible.).

²¹¹ Arguably under a BFOQ analysis "all or substantially all" United States citizens may not meet a language proficiency requirement. Under a "business necessity" test, however, reasonable alternatives clearly exist to determine such proficiency and a citizenship requirement probably would fail.

²¹² It has been noted that:

Japanese citizenship can easily constitute a business necessity in a factual setting such as that present in *Sumitomo*. The extensive cultural differences between Japanese society and American society dictate that in any liason [sic] between the two, the parties must have a strong working knowledge of how both cultures operate. The structure of the trading company dictates such a liason [sic], and Japanese college graduates have been educated in how to handle the differences. Few potential American applicants have had this extensive training. The costs of the process are borne by the trading company, which has a vested interest and expectation in retaining the employee.

Lansing & Palmer, *Sumitomo Shoji v. Avagliano: Sayonara to Japanese Employment Practices in Conflict with Title VII*, 28 ST. LOUIS U.L.J. 153, 167 (1984).

²¹³ 103 F.R.D. 562 (S.D.N.Y. 1984).

ployees as "non-rotating staff."²¹⁴ The rotating staff was further categorized as employees with "titles" and "general" employees.²¹⁵ Plaintiffs have indicated they will argue "that even if a business necessity defense could be established as to relatively high echelon positions at Sumitomo, there could be no business necessity defense for positions filled by Japanese nationals listed as general employees."²¹⁶

B. Labor-Management Relations

1. Developing Agenda Items: Japan in the United States

The form of foreign direct investment in the United States and the organization of the foreign multinational are critical in determining the types of labor management issues. Foreign companies operating in the United States usually establish United States-based affiliates, often through locally incorporated subsidiaries or branch offices. More companies, especially manufacturing industries, are beginning to form joint ventures with American companies to share technological and marketing advantages.²¹⁷ Sometimes a new or merged company results from a "buyout or takeover" of an already existing American company. Under United States labor law, this may place the foreign employer under a legal obligation to recognize and bargain with an existing union in the acquired company.

Multinational corporations often organize their personnel in a way that reflects their home country experience. In this way, the foreign employer, particularly the Japanese, often hopes to retain control over the labor force and attain a level of productivity similar to that reached in the home country. Some American labor unions have interpreted these efforts as anti-union which, if true, could be unlawful.

The foreign employer's adaptation of the major features of its labor relations emphasizing employer-employee cooperation raises legal issues under the National Labor Relations Act (Act)²¹⁸ in that these practices may interfere with rights of employees to establish an independent labor union.²¹⁹ Likewise, when American companies seek to emulate or improve upon these foreign approaches

²¹⁴ *Id.* at 569.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Japan's Direct Investment, *supra* note 1, at 13.

²¹⁸ 29 U.S.C. §§ 151-169 (1982).

²¹⁹ At times, the equal employment opportunity and labor relations laws may be triggered simultaneously. For example, in one case it was alleged that a foreign employer, a Kawasaki subsidiary in Georgia, had replaced American employees with Korean nationals during a union organizational drive. *Bullard v. Omni Ga., Inc.*, 640 F.2d 632 (5th Cir. 1981).

to labor relations and utilize them in United States companies similar legal issues can arise.

While Japanese and American labor laws appear similar, the genesis was different. American labor after much social struggle "won" protections afforded by the Act; the Japanese workers to some extent were "given" their protections after World War II, partially to counterbalance the overwhelming power of the successful large intra-industry combines (*zaibatsu*).²²⁰ The evolution of each labor law has differed due to "cross-cultural differences relative to predispositions toward or against conflict or cooperation."²²¹

The key to Japanese success in industrial relations is often touted as the high degree of cooperation between labor and management.²²² The Japanese system of shared responsibility and decision-making is exemplified by supervisors below the level of section chiefs (*kacho*) who often serve as "working foremen" sharing not only the workload but also some of the supervisory powers. It is also not uncommon for former union leaders to reach high level executive positions. The effect of this is "that Japanese unions have an abundance of white-collar and supervisory members, from among whom come a disproportionate number of the leaders."²²³ Furthermore, in Japan

[t]here is a hierarchical split between upper and lower management. Only the section chief (*kacho*) is clearly excluded as a supervisor under Japanese labor law. Those just below the *kacho* level, although they are supervisors or managerial employees and thus excluded in the United States, are protected by the Trade Union Law.²²⁴

Additionally, Japanese employers have come to expect and rely on widespread use of joint employer-employee committees, consensus decision-making, and sharing of information with one or several unions as successful methods of obtaining cooperation and increasing productivity.²²⁵

By contrast, American unions often seek a course independent from the employer which may work against the creation and use of more cooperative models. There is a traditional sense of "us versus them," and the union often finds itself in an adversarial role in order to obtain benefits from the employer. Consistent with this, there is a clearer line of demarcation between supervisors and

²²⁰ See W. GOULD, *supra* note 31, at 18.

²²¹ Duff, *supra* note 41, at 639.

²²² See *supra* text accompanying notes 20-69.

²²³ W. GOULD, *supra* note 31, at 4. See R. CLARK, *THE JAPANESE COMPANY* 218 (1979) (sociological study of a Japanese company showing that "the union was under the control of older men, usually of the team leader rank").

²²⁴ W. GOULD, *supra* note 31, at 143 (emphasis original).

²²⁵ See generally *Worker Participation*, *supra* note 29, at 51-63 (discussing Japanese system of joint consultation).

employees. Supervisors usually are not protected by the Act,²²⁶ and their involvement in the union's organization may constitute a violation of the Act.²²⁷

In the United States, an employer who too closely cooperates with a joint employer-employee committee and who shares information and otherwise "deals" with the committee on bargainable subjects in a way that "by-passes" the exclusive bargaining agent or who becomes too deeply involved in the "labor organization" may be in violation of the Act.²²⁸ This may surprise some Japanese employers since they have no "exclusivity" doctrine and can have more than one union in the plant at the same time representing similar types of employees.

American labor unions may perceive this Japanese cooperative approach as paternalistic and anti-union. They argue that an employer's decision to hire workers who will fit in and refusal to quickly "recognize" a labor union for bargaining purposes are indicia of an anti-union attitude. To the extent such an attitude can be proven, it may be evidence of discriminatory intent against employees' union activities in violation of the Act.²²⁹ Japanese employers operating in the United States may find that if they attempt to use traditional managerial and industrial relations approaches, they face not only union resistance but also legal difficulties.

In addition, Japanese employers are not familiar with American-style "economic warfare." They are only accustomed to occasional confrontations with unions—such as the annual Spring Offensive (*shunto*) when industry-wide wage guidelines are negotiated through collective action—and an occasional strike of very short duration which is often intended to embarrass, not economically harm, the employer.²³⁰ Professor Tadashi Hanami has described the Japanese strike as follows:

Most of the Japanese strikes are not strikes in the Western sense. Strike is a means of protest, or more precisely, it is the only means of showing [the Japanese workers'] will. When they go on strike, they do not mean that they will never return to their jobs until they are satisfied or completely defeated. Rather, sometimes they first go on strike and then start to bargain. Employers also start to

²²⁶ 29 U.S.C. § 152(3), (11) (1982). See *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402 (1982) (supervisor who actively participates in a union is not protected under the Act), *aff'd*, 711 F.2d 383 (D.C. Cir. 1983).

²²⁷ 29 U.S.C. § 158(a)(2) (1982) (unfair labor practices by employer).

²²⁸ *Id.* § 158(a).

²²⁹ *Id.* § 158(a)(1), (3). It has been observed that "[t]he Japanese style of cooperation may indeed take on some of the characteristics of subordination, a subordination that involves a paternalism culturally alien to America. That is not an argument against promoting cooperation as a more significant element in the labor-management relationship, however." W. GOULD, *supra* note 31, at 99.

²³⁰ See T. HANAMI, *supra* note 23, at 94-97, 152-54.

bargain seriously only after the union carries out some short-term strikes and shows how serious they are.²³¹

In an American strike the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the [American] system. . . ." ²³²

As Japanese companies in the United States deal with American labor unions and as disputes arise, the cooperative and conflict-oriented traditions will inevitably clash. Such a clash, however, can be managed if common sense and cultural sensitivity direct the parties' actions. The Japanese in the United States must recognize and deal with the American labor phenomenon of "symbolic conflict," the historically supported concept that "American unions must have conflict to survive; if no legitimate issues of contention exist, unions will *create* issues."²³³ American managers and unions bargaining with Japanese ownership must work to replace symbolic conflict with cooperation.²³⁴

2. *Current Legal Implications of Replacing "Conflict" with "Cooperation" in the Employment Relationship*

a. *"Supervisors" and "Managerial" Employees*

The National Labor Relations Act grants employees the right to unionize and protects them against unfair labor practices.²³⁵ The initial requirement under the Act is that one must be an "employee" to be accorded any of its benefits.²³⁶

²³¹ W. GOULD, *supra* note 31, at 14 (footnote omitted) (quoting Hanami, *The Characteristics of Labor Disputes and Their Settlement in Japan*, in SOCIAL AND CULTURAL BACKGROUND OF LABOR-MANAGEMENT RELATIONS IN ASIAN COUNTRIES 209 (Proceedings of the 1971 Asian Regional Conference on Industrial Relations)).

²³² NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488-89 (1960) (In holding that good faith negotiations can take place during an economic strike, the Court described the "battlefield" and the anomaly of the United States system.).

²³³ Duff, *supra* note 41, at 638 (emphasis original).

²³⁴ Duff had the following advice for American management and labor:

American managers reporting to Japanese superiors and American unions bargaining in situations where management positions are dictated by Japanese ownership might do well to adjust their bargaining behavior to come more in line with Japanese processes. Indeed it may well be profitable to all concerned to consider replacing symbolic conflict with cooperation.

Id.

²³⁵ 29 U.S.C. § 157 (1982).

²³⁶ *Id.* § 152(3).

The definition of "employee" has been held to include nonresident aliens.²³⁷ The primary "agenda item" is the manner in which the law treats "supervisors" and "managerial" employees. This is of special importance in the case of "working foremen" and because of the over-abundance of managerial employees in multinational companies operating in the United States.

The definition of "supervisor" is significant because the Act specifically excludes supervisory employees who by exercise of independent judgment have the authority to determine or otherwise effectively recommend the hiring and firing of employees.²³⁸ The National Labor Relations Board (Board) recently confirmed this exclusion when it upheld an employer's dismissal of a supervisor for union activities even though the dismissal was part of a pattern of unlawful conduct against employees who were protected by the Act.²³⁹ The question of who is a supervisor is also important because, to the extent supervisors become involved within the labor union at the employer's premises, the employer could be "interfering" with other employees' rights and "dominating" the labor union in violation of section 8(a)(1) and (2) of the Act.

The line between supervisory and non-supervisory employees is blurred because Japanese and some American employers have begun giving "supervisors" more on-line responsibilities similar to other "employees," and allowing other employees to exercise increased shared supervisory responsibilities.²⁴⁰ Whether the line has been crossed must be resolved on a factual basis depending on the actual authority the individuals possess.

"Managerial" employees also have been excluded from the Act's protection. This is a non-statutory, Board-created exclusion and has been upheld by the United States Supreme Court.²⁴¹ Managerial employees are ones

who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy.

. . . [M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type

²³⁷ See, e.g., *NLRB v. Actors' Equity Ass'n*, 644 F.2d 939, 941 (2d Cir. 1981) ("Nothing in the terms or construction of the [Act] limits the meaning of the word 'employees' to American citizens or permanent residents."). Illegal aliens have also been held to be covered. *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979).

²³⁸ The term "supervisor" is defined as "any individual having authority, in the interest of the employer, to hire. . . discharge. . . or effectively to recommend such action." 29 U.S.C. § 152(11) (1982). The term "employer" includes "any person acting as an agent of an employer, directly or indirectly." *Id.* § 152(2).

²³⁹ *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. at 402-04.

²⁴⁰ For discussion of case law on supervisory status, see Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 HARV. L. REV. 1713 (1981).

²⁴¹ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

positions, those who are closely aligned with management as true representatives of management.²⁴²

The reason for this exclusion is that managerial employees are, in effect, the employer. To permit them labor bargaining rights would be to create a conflict of interest not intended by the law. This category has the potential to be large and subject to some manipulation by an employer who by adroit job assignment might attempt to make employees "managerial" to exclude the employer from the prohibitions of the Act vis-a-vis the employees as well as removing rights from those employees.

In *NLRB v. Yeshiva University*,²⁴³ the United States Supreme Court applied the managerial exclusion rule to a university faculty which the Board determined consisted of managerial employees because of the degree of control it exerted over working conditions. It seems that this decision fails to grant proper recognition to and encourage the union's role not only to *confront* but also to *cooperate* with management and likely needs re-examination by the Board and the courts, especially in light of the increasing reliance on cooperative labor-management programs in the United States. The *Yeshiva* case and the managerial exclusion rule are of particular importance to Japanese enterprises operating in the United States because they retain significant numbers of management employees and utilize the traditional Japanese management practices of employing working supervisors and sharing their authority for decisions among various levels of the work force. It remains to be seen how far down the Japanese company's hierarchical ladder the Board will find "managerial" employees.²⁴⁴

b. Joint Employer-Employee "Committees"

The recent growth of employee participation plans implemented by employers, employees, and unions indicates a recognition of the advantages of changing labor-management relations from postures of conflict to positions of cooperation. Reasons for implementing such plans include improved work environment and worker satisfaction, as well as increased efficiency and productivity.²⁴⁵ In addi-

²⁴² General Dynamics Corp., Convair Aerospace Div. San Diego Operations, 213 N.L.R.B. 851, 857 (1974) (footnote omitted).

²⁴³ 444 U.S. 672 (1980).

²⁴⁴ Of less statistical impact is the exclusion from collective bargaining of nonmanagerial "confidential" employees who are engaged in the employer's labor relations functions. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (approving the Board's labor nexus test to determine whether a "confidential" employee should be excluded).

²⁴⁵ See generally Ackoff & Deane, *supra* note 84, at 241-45 (study of ALCOA's quality of worklife and trust and cooperation programs). There is some argument, however, that the price of cooperation and increased productivity may be the corresponding de-emphasis of individualism

tion, they have obvious potential for use by some employers as an alternative to a union work environment.

Joint employer-employee committees and programs are increasingly pervasive in the United States not only with foreign multinational companies, but also with American companies. These committees and programs include quality-of-work-life programs, safety committees, suggestion committees, and committees with a broader mandate to discuss and resolve problems related to production and working conditions. Broader committees concern themselves with production standards, product quality, job and product improvement methods, work assignment, market projections, safety equipment, automation effects, and other traditionally "management" matters. The exact composition of the committees varies, but they inevitably include management personnel, sometimes as a majority, and non-management employees. While the committees usually work to reach an agreement, their actual utility and power come in making recommendations to the employer.

Joint consultation committees in Japan and the United States are not limited to non-union employers. In Japan, it is reported that:

Collective bargaining at the enterprise level through joint consultation is the most popular form of worker participation at present. This form of worker participation aims at efficiency and productivity because it deals with the introduction of new machinery, production plans, and the like, and it also is concerned with how job security may be affected by technological change. Improvements in the quality of work life are also handled by this form of worker participation because it deals with terms and conditions of employment as issues of joint consultation in collective bargaining at the enterprise level.²⁴⁶

Japanese employers in the United States also have been successful in using joint consultation in a unionized setting.²⁴⁷ For example, in 1970, Sanyo of Japan took over a failing United States electronics firm and immediately obtained union input on improving quality and productivity. The company thereafter doubled its productivity and tripled its work force. Observers attribute much of this success to the joint efforts of union and management.²⁴⁸ Legal issues under

and resulting diminution of choice and quality of life.

²⁴⁶ *Worker Participation*, *supra* note 29, at 53.

²⁴⁷ One commentator has stated that "[c]ontrary to conventional wisdom, the Japanese style of management is not limited to non-union environments. In fact, there are a number of instances in which Japanese concerns acquired unionized, but unprofitable, American firms and turned them around by eliciting union cooperation." Tsurumi, *supra* note 12, at 269. See Sockell, *The Legality of Employee Participation Programs in Unionized Firms*, 37 INDUS. & LAB. REL. REV. 541 (1984) (discussing the legality under the Act of joint participation programs that co-exist with American unions).

²⁴⁸ See, e.g., Tsurumi, *supra* note 12, at 269-70. "As Sanyo learned, unionized workers are

American labor laws will arise regardless of whether these joint consultation approaches are in union or non-union settings or whether they are used by Japanese or American employers.

(1) *Labor Organization*

The "agenda item" discussed here is whether a joint employer-employee committee is a "labor organization" under the National Labor Relations Act. This is important because under section 8(a)(2) of the Act an employer may not "dominate or interfere with the formation or administration of any *labor organization* or contribute financial or other support to it."²⁴⁹ Section 2(5) of the Act defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."²⁵⁰

The purpose of the law was to prevent an employer from getting so involved with an employee organization as to establish a "company union." More specifically, the law sought to prevent a collective bargaining setting in which the employer would in effect be sitting at the bargaining table conducting a colloquy with itself. The law, however, did not prevent employer-employee interaction and relations.²⁵¹

In *NLRB v. Cabot Carbon Co.*,²⁵² the United States Supreme Court held that a committee which was set up by the employer with elected employee representatives and which dealt with grievances, labor disputes, wages, rates of pay, and conditions of work was a "labor organization."²⁵³ The Court considered three factors: the structure of the organization, the subject matter with which it

often well positioned to join in decisionmaking processes and quality control programs precisely because of the job protection provided by unionization." *Id.* at 270.

²⁴⁹ 29 U.S.C. § 158(a)(2) (1982) (emphasis added). See *infra* text accompanying notes 260-79 for a discussion of domination.

²⁵⁰ 29 U.S.C. § 152(5) (1982).

²⁵¹ Senator Wagner, the sponsor of the law, commented that:

Nothing in the bill prevents employers from maintaining free and direct relations with their workers. . . . The only prohibition is against the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules or regulations without his consent, and which cannot live except by the grace of the employer's whims.

79 CONG. REC. 2371-72 (1935). See also Feldman & Steinberg, *Employee-Management Committees and the Labor Management Relations Act of 1947*, 35 TUL. L. REV. 365, 376-85 (1961) (discussing the legislative history of the Act).

²⁵² 360 U.S. 203 (1959).

²⁵³ *Id.* at 213.

dealt, and whether it was "dealing with" the employer.²⁵⁴ The Court held that almost any formal or informal employee entity would qualify and that the entity's concern with only one of the subject matters in section 2(5) would be sufficient. Under section 2(5), "dealing" was not synonymous with "bargaining" but was larger and encompassed discussions and the proposal of recommendations.²⁵⁵

The Board generally has followed *Cabot*.²⁵⁶ The most noteworthy exceptions are court decisions. In the leading case of *NLRB v. Streamway Division of the Scott & Fetzer Co.*,²⁵⁷ the Sixth Circuit Court of Appeals held that an employee committee consisting of employees who served on a rotating basis, who were not intended to be representative of other employees, and who met with management to discuss company operations on a regular basis, was not "dealing" with the employer.²⁵⁸ The court noted that *Cabot* should not "be read so broadly as to call any group discussing issues related to employment a labor organization."²⁵⁹

The current rule of law is that employee organizations and many of the joint consultation committees generally are "labor organizations" under the Act. As can be seen from *Scott & Fetzer*, however, such a determination will depend on the facts of each case.

(2) *Employer Domination, Interference, or Support*

The next "agenda item" is the degree to which an employer may get involved with a labor organization. More specifically, the issue is the amount of cooperation an employer may extend before it "dominates or interferes" with the formation or administration of the labor organization or otherwise unlaw-

²⁵⁴ *Id.* at 213-18.

²⁵⁵ *Id.* at 211. See *NLRB v. Ampex Corp.*, 442 F.2d 82, 84 (7th Cir.) (section 2(5) has been "broadly construed"), *cert. denied*, 404 U.S. 939 (1971).

²⁵⁶ But see *General Foods Corp.*, 231 N.L.R.B. 1232 (1977) (teams of employees administering job assignments and deciding overtime are not labor organizations); *Sparks Nugget, Inc.*, 230 N.L.R.B. 275 (1977) (employee council acted only in an adjudicatory function in grievances), *modified sub nom.* *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

²⁵⁷ 691 F.2d 288 (6th Cir. 1982).

²⁵⁸ *Id.* at 291-95.

²⁵⁹ *Id.* at 294. Also important to the court was the fact that there was no evidence that anti-union animus existed and that the employees' free choice seemed best served by this vehicle (that union had twice been defeated in elections). For a critical analysis of this approach, see Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1668-72 (1983). See also Hogler, *Employee Involvement Programs and NLRB v. Scott & Fetzer Co.: The Developing Interpretation of Section 8(a)(2)*, 35 LAB. L.J. 21 (1984).

fully supports the organization in violation of section 8(a)(2) of the Act. The Board has emphasized that it will strictly construe the Act and find a violation even when there is evidence of potential control.²⁶⁰ It has found employer "assistance and support" unlawful when the employer provided the labor organization with facilities or other compensation.²⁶¹ The Board has also found violations when the employer sets up the employee committee, designates its members, or sets or controls the agenda, and the courts have agreed.²⁶²

The number of "managerial" or "supervisory" employees who are on the committee or otherwise involved in its establishment or administration is important. The more involved such employees are, the more likely a violation will be found. Also of significance are the numbers of "working foremen," for if they are considered supervisors, their involvement with labor organizations can taint the validity of the organization and render the employer liable under section 8(a)(2) of the Act.

Lawful employer-employee cooperation, however, is possible.²⁶³ In *NLRB v. Northeastern University*,²⁶⁴ the First Circuit Court of Appeals held that the Board should apply a standard of *actual*, not *potential*, domination in section 8(a)(2) cases.²⁶⁵ The court rejected the Board's finding of a violation where an employer had "cooperated" with an employee committee by appointing part of the group and providing facilities and supplies.²⁶⁶ In *Chicago Rawhide Manufacturing Co. v. NLRB*,²⁶⁷ the Seventh Circuit Court of Appeals also refused to enforce the Board's finding of a section 8(a)(2) violation, holding that actual domination was required in domination cases.²⁶⁸ The court concluded that "[c]ooperation only assists the employees. . . in carrying out the independent intentions."²⁶⁹ Thus, when the employer helped establish a joint consultation

²⁶⁰ See Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 511-15 (1973) (discussing the traditional posture of the Board to find per se violation).

²⁶¹ See, e.g., *Homemaker Shops, Inc.*, 261 N.L.R.B. 441 (1982).

²⁶² See *NLRB v. Fremont Mfg. Co.*, 558 F.2d 889 (8th Cir. 1977) (holding that employer's unilateral creation of a progress team was unlawful domination and interference); *NLRB v. Ampex Corp.*, 442 F.2d 82 (ruling that a communications committee was a labor organization dominated by the employer).

²⁶³ See generally Schmidman & Keller, *Employee Participation Plans as Section 8(a)(2) Violations*, 35 LAB. L.J. 772, 774-75 (1984) (discussing recent Board and court cases allowing more employer-employee cooperation); Schurgin, *The Limits of Organized Employer-Employee Relations in Non-Union Facilities: Some New Evidence of Flexibility*, 57 CHI.-KENT L. REV. 615 (1981) (recognizing a potential shift in the Board's attitude which could allow more management-employee relations).

²⁶⁴ 601 F.2d 1208 (1st Cir. 1979).

²⁶⁵ *Id.* at 1213.

²⁶⁶ *Id.* at 1214-16.

²⁶⁷ 221 F.2d 165 (7th Cir. 1955).

²⁶⁸ *Id.* at 167-68.

²⁶⁹ *Id.* at 167.

committee that met during working hours and contributed to the committee's recreation fund, it was "not intending. . .to coerce or influence the employees' choice of bargaining representative."²⁷⁰

The Ninth Circuit Court of Appeals in *Hertzka & Knowles v. NLRB*²⁷¹ also upheld the test of actual domination, holding that a joint committee which considered employment issues was not dominated by the employer.²⁷² The court held that the employees merely had been exercising their free choice in establishing and maintaining such a committee and had been satisfied with it.²⁷³ The court noted two additional points. First, employees should be free to allow management partners to serve on the committees even if this results in "weaker" bargaining than under a formal union setting.²⁷⁴ Second, the court noted that

[f]or us to condemn this organization would mark approval of a purely adversarial [sic] model of labor relations. Where a *cooperative* arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act.²⁷⁵

Therefore, there is a growing body of largely court-made law which permits greater latitude and more cooperation in employer-employee joint consultation committees. Absent evidence that the employer is actually interfering or dominating the labor organization, and under the right economic conditions, the law may continue to be redirected toward permitting employer-employee cooperation.²⁷⁶ Three issues remain: (1) whether the entity was freely chosen by em-

²⁷⁰ *Id.* at 170.

²⁷¹ 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975).

²⁷² 503 F.2d at 630-31.

²⁷³ *Id.* at 631.

²⁷⁴ The court noted that:

The question essentially comes down to the significance of having management partners on the committees. True this may mean bargaining is "weaker" than if there were a formally organized union. Yet this feature too was chosen by the employees, and it is one with which, for all the record shows, they are not dissatisfied.

Id.

²⁷⁵ *Id.* (emphasis added).

²⁷⁶ See W. GOULD, *supra* note 31, at 99 (arguing that although the Japanese system may have "characteristics of subordination," cooperation should be encouraged); Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809, 822-45 (1977) (discussing the Board's shift toward emphasizing employee free choice and recognizing changes in the American labor climate); Schmidman & Keller, *supra* note 263, at 774-75; Schurgin, *supra* note 263, at 623-31.

ployees,²⁷⁷ (2) whether employees remain satisfied with it,²⁷⁸ and (3) whether the committees were operating in an anti-union environment.

At the same time, the Board and courts should be cautious that such cooperative approaches are not used as anti-union devices by sophisticated employers. A warning has been sounded:

Except in blatant cases, antiunion animus is difficult to prove. Managers are increasingly sophisticated and subtle in their strategies to keep unions out. The publicly stated goals of employee participation plans are often mere gloss and state only a portion of the intended goals. No informed manager will openly reveal that an important goal of an employee participation plan is to weaken existing unions or to keep employees from unionizing. Cases involving less direct evidence of motive are often found not to violate the Act.²⁷⁹

(3) *By-Passing the Exclusive Representative*

The legal implications of establishing a joint consultation committee are manageable if the employer and union cooperate. Unions often see these joint approaches as enhancing their influence and responsibilities. For example, a union has no right under the Act to bargain over non-mandatory subjects;²⁸⁰ therefore, much information relating to productivity and managerial decisions affecting plant operations remains unavailable.²⁸¹ If the employer and union agree to cooperate, however, both parties may deal with all of these matters in addition to the usual bargaining opportunities guaranteed under the Act. If a union does not wish to cooperate with the employer in joint consultation programs, the employer may decide non-mandatory matters without the union's input or "blessing."

Problems could arise in this setting because the Board-certified union is the exclusive representative of the employees. The employer must deal (bargain) only with that "labor organization" and not with other "labor organizations," including joint consultation committees, over mandatory subjects of bargaining or be in violation of the Act.²⁸² The "agenda items" discussed in this section

²⁷⁷ *Hertzka*, 503 F.2d at 631. The courts have been criticized for their lack of critical analysis or strict evidence requirements on this issue. See, e.g., Schmidman & Keller, *supra* note 263, at 778.

²⁷⁸ *Hertzka*, 503 F.2d at 631.

²⁷⁹ Schmidman & Keller, *supra* note 263, at 778.

²⁸⁰ 29 U.S.C. § 158(d) (1982).

²⁸¹ See, e.g., *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 317-20 (1979) (company's refusal to turn over to the union individual employee test results without the employee's consent did not violate the statutory good faith obligation).

²⁸² 29 U.S.C. § 159(a) (1982). See Schatzki, *Majority Rule, Exclusive Representation, and the*

are the conditions under which the employer, in a unionized setting, may properly deal with a joint committee on bargainable items without "by-passing" the exclusive representative. The "by-passing" problem is allayed when the union is also the joint committee, but the issue of section 8(a)(2) domination remains.

Unlike American labor law, Japanese law lacks the "exclusivity" principle. One author has described the Japanese system as follows:

Under Japanese law, all bona fide unions have the right to bargain, and employers *must* bargain with *all* bona fide unions. . . . Conspicuous by its absence is any notion of a *single* union for all the employees of a plant. As a practical matter, employers must bargain with *majority* and *minority* unions.²⁸³

Thus, Japanese employers operating under American law must be wary in "dealing" with joint consultation "labor organizations" on mandatory subjects of bargaining in a unionized setting.²⁸⁴

As Japanese and American employers move into new dimensions of employer and employee joint cooperation and as clear lines between management and workers become blurred, employers and employees must resolve the following issues in light of new Japanese-American business dealings: (1) What is a "labor organization"? (2) When does excessive and unlawful employer involvement occur in joint participation programs? (3) When and to what extent may an employer deal with a joint consultation committee to the exclusion of a certified bargaining representative?

c. Unionization and Bargaining Obligations

(1) Unionization

There seems to be a prevailing stereotype that Japanese employers operating in the United States are anti-union and tend to resist unionization whenever possible in order to utilize their own successful personnel systems.²⁸⁵ Statistics and studies show that this may not be true, at least not to a greater extent than American employers.²⁸⁶ As of 1980, the unionization rate in the United States

Interests of Individual Workers: Should Exclusivity Be Abolished?, 123 U. PA. L. REV. 897, 897-919 (1975).

²⁸³ Duff, *supra* note 41, at 633 (emphasis original).

²⁸⁴ See 29 U.S.C. §§ 158(a)(5), 159(a) (1982).

²⁸⁵ See Kujawa Case Study, *supra* note 71, at 10; Marett, *supra* note 77, at 245-50.

²⁸⁶ As a recent study comparing Japanese subsidiaries in the United States with American firms concluded:

Managements at the majority of the Japanese subsidiaries preferred a non-union environment. They stated they wanted to be free to manage and to innovate at the shop level.

was 24.5%, whereas United States-based Japanese companies had a rate of 22.7%.²⁸⁷

Surveys have also dispelled the popular stereotype that Japanese plants are most often placed in non-union, "right-to-work" areas of the United States. In fact, these plants are dispersed in many locations.²⁸⁸ One study concluded that:

True, most of the [Japanese] subsidiaries don't want a union relationship. But their location decisions subjugate this preference to other concerns, as do their entry decisions that include a takeover of a unionized firm. Also, where a union relationship exists, the Japanese seem to be able to work with it to their own satisfaction. They appear to be "environmental takers" in their union related matters.²⁸⁹

The Japanese approach to labor relations presents an alternative to the traditional American adversarial system. Although Japanese employers attempt to maximize managerial control where they can, the Japanese approach is not necessarily incompatible with unionization.²⁹⁰ The difference between Japanese and American employers lies in their perceptions of "managerial control": the Japanese see it as involving a greater degree of employee participation. Whether American employees view the Japanese perception as anti-union or merely different will be reflected in large part by the success or failure of the unionization drives.

The Act prohibits employers, as well as unions, from interfering²⁹¹ with or discriminating²⁹² against employees because they engage in or support union

While the origin of this preference may in these cases be Japanese, the position is certainly not distinctively Japanese. The majority of the American and foreign firms expressed similar views for similar reasons.

Kujawa Case Study, *supra* note 71, at 10. "The data also suggest, however, that the U.S. firms were much more aggressive in their dealings with unions than were the Japanese subsidiaries." *Id.* at 12.

²⁸⁷ Marett, *supra* note 77, at 247 & n.20 (citing Japan Trade Center/New York, U.S.-Japan Trade Update 5 (1982) (Japan External Trade Organization study)). In the manufacturing industry, it was estimated in 1983 that about one-fourth of some 300 Japanese-owned companies in the United States were unionized. English, *UAW vs. Japanese: An Uphill Battle*, U.S. NEWS & WORLD REP., July 4, 1983, at 75.

²⁸⁸ As of 1982, Japanese plants were located in areas as diverse as California (116 plants), Alaska (35), New Jersey (23), Georgia (19), Washington (19), Illinois (17), Texas (17), New York (16), and North Carolina (16). Marett, *supra* note 77, at 246 & n.19 (citing Japan Economic Institute of America, *Japan's Expanding Manufacturing Presence in the United States* (1982)).

²⁸⁹ Kujawa Case Study, *supra* note 71, at 13.

²⁹⁰ See Marett, *supra* note 77, at 247.

²⁹¹ 29 U.S.C. § 158(a)(1), (b)(1) (1982).

²⁹² *Id.* § 158(a)(3), (b)(2).

activities or because they refrain from such activities.²⁹³ The body of law interpreting these statutory provisions raises only a few "agenda items" regarding Japanese and other multinational employers.²⁹⁴

The leading case on employee discrimination is *Wright Line*²⁹⁵ where the Board established a two-prong test for proving violations. First, the government must prove that the employer discriminated against the employee for anti-union reasons. Second, the employer has the burden to prove as an affirmative defense that its action would have been the same even in the absence of the protected conduct. The government may then seek to rebut the employer's defense by showing that the employer's conduct was pretextual.²⁹⁶ Even if an employer refuses to hire or discharges someone because of his or her attitudes toward unions, the employer could prevail by showing that proper cause—such as the employee's substandard work performance—existed.

Japanese employers face a potential problem when they employ their traditional management practices of not readily discharging employees by encouraging improvement or retaining employees in non-promotable positions. When employers finally do fire an employee, they may not have a sufficient record of the employee's negative job performance to justify a discharge for cause. In addition, the failure of Japanese companies to consistently enforce rules may convince the Board that these employers have insufficient "cause" to discharge or that the otherwise sufficient reasons put forward were really "pretextual" because they were never used before in a consistent manner.

(2) *Bargaining Obligations*

Multinational employers may establish operations in the United States in a variety of ways. They may begin a new business, acquire an already existing American company, or enter into a joint venture arrangement with a United States company. Different legal doctrines are triggered and bargaining obligations vary depending on the method chosen.²⁹⁷

Under the Act, an American employer faced with potential unionization may

²⁹³ *Id.* § 157 (right of employees to organize).

²⁹⁴ For a discussion of the application to the General Motors-Toyota Joint Venture of § 8(a)(3) (employer's unlawful interference with right to unionize), see Nelson, *supra* note 85, at 651-63.

²⁹⁵ 251 N.L.R.B. 1083 (1980), *aff'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

²⁹⁶ 251 N.L.R.B. at 1089. The Supreme Court upheld the *Wright Line* test. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

²⁹⁷ For example, a new business has the right to (1) voluntarily accept a majority union if requested, or (2) wait for Board-conducted union election while it and the union seek to convince employees to vote "their way," or (3) voluntarily or "involuntarily" assume obligations from an "acquired" company to recognize and bargain with a union already at the acquired company.

legitimately resist or voluntarily recognize the union's or the employees' efforts.²⁹⁸ Resistance to unionization by Japanese employers, however, has been characterized as follows: "No decent employer dares to deny establishment of a union or to refuse bargaining openly unless they believe that they have some special justification to do so."²⁹⁹

An "agenda item" arises when a foreign employer acquires through merger or sale a company that had an existing bargaining obligation with a union. The foreign employer may either voluntarily assume the obligation as part of the sale or "involuntarily" assume the obligation through application of the "successor doctrine." This doctrine requires "sufficient continuity" between the new and old enterprises.³⁰⁰ Although the United States Supreme Court has noted that there can be "no single definition of 'successor' which is applicable in every legal context,"³⁰¹ a bargaining obligation will be found to exist when the old bargaining unit remains the same and when a majority of the new employees are represented by an agent of the old employee.³⁰² The key element is whether a majority of the new work force is composed of employees from the predecessor's unionized work force.

Another key consideration is the Board's and courts' use of "related factors" in determining continuity between the old and new employers. These factors include "whether the same jobs exist under the same working conditions" and "whether the new company employs the same supervisors."³⁰³ If a foreign company implements a significant change in operations, management, or job duty responsibilities, it likely would not succeed to the old employer's duty to bargain.³⁰⁴ If a majority of the new employer's employees are hired from the old employer's unionized work force and if there is continuity between the old and

²⁹⁸ *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974) (An employer may legitimately ask for an election to verify a union's claim that it received authorization from a majority of the employees to be their collective bargaining representative.). *But see Sullivan Elec. Co. v. NLRB*, 479 F.2d 1270 (6th Cir. 1973) (obligation may change upon independent knowledge of majority status).

²⁹⁹ Hanami, *Unfair Labor Practices—Law and Practice*, JAPAN LAB. BULL., June 1983, at 5. Japan has enterprise unionism and no "exclusivity" principle, and there is no need for union elections. The employer, therefore, has no real hope of "defeating" a union in a unionization drive and conducts itself accordingly.

³⁰⁰ *See NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972).

³⁰¹ *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 263 n.9 (1974).

³⁰² *Burns*, 406 U.S. at 281.

³⁰³ *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982), *enforced*, 709 F.2d 623 (9th Cir. 1983); *Border Steel Rolling Mills, Inc.*, 204 N.L.R.B. 814, 821 (1973) (The majority of the three-member panel adopted the opinion of the administrative law judge without drafting its own opinion.).

³⁰⁴ The Supreme Court in *Burns* noted that the resulting "successorship" would have been a different case if *Burns'* operational structure and practices had differed from the predecessor's so that the bargaining unit would have been no longer appropriate. 406 U.S. at 280.

new enterprises, the new employer is obligated to recognize and bargain with the union. There is no corresponding obligation, however, which binds the successor to a prior collective bargaining agreement, even though that agreement may have contained a successor clause.³⁰⁵

Finally, once a duty to bargain exists, it continues during as well as before a collective bargaining agreement is reached.³⁰⁶ Failure to meet that obligation and the duty of the employer to furnish the union with information relevant to bargaining violates the "good faith" bargaining obligation of the Act.³⁰⁷ There is, however, no duty to bargain over "terms and conditions contained in a contract."³⁰⁸

Japanese employers who use joint consultation committees and other traditional forms of cooperation may find that, under American labor law, certain limits on bargaining obligations have been waived, thus resurrecting the continuing bargaining obligation. At any rate, the ongoing bargaining obligation seems to fit the Japanese style of labor relations because it promotes harmony and stability.

d. Dispute Settlement

The American phenomenon of the widespread use of strikes as a method of dispute resolution contrasts with the Japanese experience in which strikes are fewer and of shorter duration.³⁰⁹ In the United States, strikes are called to exert economic pressure to coerce the employer into modifying its bargaining position; in Japan, strikes are usually called to bring the employer to the bargaining table and to shame and embarrass the company.³¹⁰ A Japanese company representative observed that:

In Japan, the union lives with the company and never pulls the trigger unless it finds itself in an extremely serious situation. It tries as much as possible to work with us on the same ground, because its members' future and prosperity are directly linked with ours. The important question for us right now is how to

³⁰⁵ *Id.* at 272; *Bartenders & Culinary Workers Union v. Howard Johnson Co.*, 535 F.2d 1160 (9th Cir. 1976). There are several exceptions in which case the successor could be obligated on the prior agreement. These include adoption, either explicitly or implicitly, *see Audit Servs., Inc. v. Rolfsen*, 641 F.2d 757 (9th Cir. 1981); and alter ego, where no real change in ownership or management occurs, *see NLRB v. Tricor Prods., Inc.*, 636 F.2d 266 (10th Cir. 1980). Mere transfer of stock, as opposed to purchase of assets, will probably not affect the liabilities.

³⁰⁶ 29 U.S.C. § 158(d) (1982).

³⁰⁷ *Id.* § 158(a)(5), (d).

³⁰⁸ *Id.* § 158(d). *See Jacobs Mfg. Co.*, 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952).

³⁰⁹ W. GOULD, *supra* note 31, at 13.

³¹⁰ *See T. HANAMI*, *supra* note 23, at 149-54.

instill this concept in our American workers.³¹¹

Both Japanese and American employers usually look for alternatives to strikes and use conciliation and mediation whenever possible. If that fails, strikes seem to occur regardless of whether the employer is Japanese or American.³¹² Traditionally, however, Japanese companies specifically design their labor relations systems to avoid strikes. Whether this will work in practice in their American ventures remains to be seen.

C. Wrongful Discharge

The ability of an employer in the United States to hire and fire employees long has been considered part of the American "free enterprise system" and a key to successful business control. This discretion has been a target for unions since their beginning. Unions inevitably seek to negotiate contract limitations, such as "just cause" provisions, into collective bargaining contracts for unionized employees. Non-union employees, although usually more dependent on the employer's discretion, also enjoy rights under various labor laws.³¹³

In the past decade, courts have begun to limit the common law right of employers to dismiss at-will employees by utilizing contract and tort theories to make available to aggrieved parties a range of remedies including compensatory and punitive damages. Sympathetic juries do not seem to hesitate to award large relief to wrongfully discharged employees.³¹⁴ Many multinational companies, including Japanese enterprises operating in the United States, are closely watching this judicial trend. They are often shocked by the size and frequency of the awards and are concerned that their employment practices might result in similar judgments against them.

³¹¹ *How the Japanese Manage in the U.S.*, FORTUNE, June 15, 1981, at 102 (statement of Hajime Nakai, executive managing director of Sanyo Electric Co. and president of a United States subsidiary).

³¹² See Kujawa Case Study, *supra* note 71, at 13.

³¹³ For example, a dismissal based on sex harassment may violate Title VII and be a common law tort. An employer's failure to retain a "permanent" employee who replaced a striker may arguably violate the National Labor Relations Act and create the basis for a common law breach of contract cause of action.

³¹⁴ See, e.g., *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir.) (\$1.9 million awarded to three dismissed employees), *cert. denied*, 459 U.S. 859 (1982); *Norton v. Kaiser Steel Corp.*, 115 L.R.R.M. (BNA) 4033 (Cal. Super. Ct. 1982) (\$4.7 million awarded to a fired foreman). See also *National Steel is Told to Pay Fired Worker \$850,000 Plus Interest*, Wall St. J., Mar. 23, 1983, at 58, col. 2 (employee fired because of disagreement over pension fund); *Kaiser Steel Told to Pay \$4.7 Million in Damages to a Former Foreman*, Wall St. J., Aug. 4, 1982, at 38, col. 4 (jury agreed company breached implied contract and did not deal with employee in good faith).

This section briefly identifies and discusses some of the newly developing legal "agenda items" arising out of the wrongful termination of employees. While the law applies equally to American and Japanese companies, the latter may face special legal problems resulting from their managerial and labor relations practices, such as permanent employment and emphasis on company loyalty.

1. *United States-Japan Comparisons*

In the United States, there are several types of employment arrangements. A majority of American workers are employed at-will. They can be discharged at their employer's pleasure and enjoy no legal job tenure and very little job security. Courts have generally interpreted employment for unspecified terms as at-will employment.³¹⁵ Courts usually will find a "cause" requirement for termination of contracts for a definite term.³¹⁶ Contracts for permanent employment are relatively rare and require a clear commitment before they are enforced.³¹⁷

At-will employment may be expressly altered through collective bargaining agreements. For example, unions, which represent about 20% of the American work force, normally negotiate "just cause" provisions into collective bargaining agreements and provide for review of the employer's decisions through private grievance arbitration.³¹⁸ Some collective bargaining agreements, such as those in the auto industry, have gone even further in providing job security:

In six plants of General Motors and Ford, the 1982 collective bargaining agreements provide for permanent employment for 80 percent of the workers. Although the income-maintenance approach, which provides that dismissed employees with at least 10-15 years' seniority will receive at least 60 percent of their wage until retirement, will indirectly discourage management from dismissing workers. To a lesser extent, supplemental unemployment compensation benefits accomplish the same objectives. This is the first major collective bargaining agreement that appears to emulate the Japanese *shushin koyo* [permanent

³¹⁵ See, e.g., *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Walker v. Modern Realty, Inc.*, 675 F.2d 1002 (8th Cir. 1982); *Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 725, 649 P.2d 181, 183 (1982).

³¹⁶ See, e.g., *Alpern v. Hurwitz*, 644 F.2d 943 (2d Cir. 1981) (rejecting argument that court should imply a provision allowing termination without cause).

³¹⁷ See, e.g., *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 89 A.2d 237 (1952) (An oral promise to hire plaintiff for life was not enforceable because the terms and conditions were not clearly and definitely expressed.).

³¹⁸ In a recent study, grievance arbitration provisions were estimated to be in 1528 of the 1550 collective bargaining agreements analyzed. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2095, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JANUARY 1, 1980, at 112-13 (May 1981).

employment].³¹⁹

In addition, the courts may find implied-in-fact contractual limitations on discharging an at-will employee based on written or oral assurances by the employer.³²⁰

The Japanese system of loyalty and cooperation tends to promote job stability and, to a certain degree, permanent employment.³²¹ In Japan and the United States, workers are protected by statute against dismissals based on illegal grounds, such as union activity. In addition, Japanese law requires not only thirty days notice, but also just cause.

Despite the absence of explicit statutory or constitutional authority, the courts have imposed a just-cause substantive limitation on employers' right to dismiss workers. If an employer does not have just cause for dismissing a worker, the dismissal will be regarded as invalid. . . . The fact that the just-cause obligation applies to economic dismissals or layoffs attributable to a business decline as well as to disciplinary disputes makes the Japanese situation quite different from the American.³²²

Temporary employees in Japan, however, usually can be terminated without cause. Some Japanese courts have devised a "good faith" limitation to protect temporary employees who have had their contracts repeatedly renewed.³²³

Some 1300 labor-related civil cases per year are brought in Japanese district

³¹⁹ W. GOULD, *supra* note 31, at 103 (emphasis original).

³²⁰ See, e.g., *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (course of conduct can show intent for definite term contract). *Contra* *Heidick v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. Super. Ct. 1982) (employer booklet was unilateral statement of policy which did not set out a definite term of employment).

³²¹ See *supra* text accompanying notes 47-57.

³²² W. GOULD, *supra* note 31, at 106. Examples of just cause are typical: chronic lateness, insubordination, theft, and gross negligence. *Id.* at 108 (quoting K. Hokao, Employer Initiative in Employment Termination and the Income Security of the Worker Concerned, National Report 3 (n.d.)). The requirement of "cause" for dismissals is consistent with other international practices. The International Labor Organization recently promulgated standards for the termination of employees. One of the standards provided: "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service." INTERNATIONAL LABOUR ORGANIZATION, TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER (Report V(2)) 68 (68th Sess. 1982). For a discussion of the European experience on employee dismissals, see PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE 46-80, 135-68 (J. Stieber & J. Blackburn eds. 1983) (Proceedings of the Conference on Protecting Unorganized Employees Against Unjust Discharge, School of Labor & Industrial Relations, Michigan State University).

³²³ W. GOULD, *supra* note 31, at 107 (quoting K. Hokao, *supra* note 322, at 4).

courts; most of these cases concern employees who have lost their jobs.³²⁴ One author has reported that "a court interpretation of an individual employment contract or the way in which a court resolves a labor conflict will not be far removed from the practices that prevail in Japanese industrial relations."³²⁵ The remedies provided by the courts are diverse and far-reaching though equitable in nature, including reinstatement and rescission of employer orders.³²⁶ This is consistent with Japanese tradition in non-legal and non-contractual settlements where an apology or restoration of harmony is just as important as compensation of a victim.

Therefore, Japanese employers operating in the United States are not unfamiliar with the just cause requirement or with legal challenges to employee dismissals. There is some indication, however, that the Japanese are still adjusting to the American victim's tendency to litigate and to seek punitive as well as compensatory damages in a jury trial.

2. *Current Legal Developments*

Most states have now created some form of judicial exception to the at-will rule based on either contract or tort theories.³²⁷ An increasing number of states

³²⁴ Matsuda, *supra* note 44, at 190. It is also reported:

Another significant phenomenon in recent years is the steady increase in cases where an employer's order of transfer or discipline, short of disciplinary discharge, is challenged. The number of damage suits against employers, brought by employees or unions on the ground of either breach of contract or tort, though still not high, is remarkable, particularly considering the traditional unpopularity of this kind of litigation in Japanese industrial relations.

Id. at 191.

³²⁵ *Id.* at 192. There is some argument that arbitrators, not courts, should be making these decisions.

If a court plays the role of arbitrator, then labor litigation is no different from compulsory arbitration, which nobody likes to see in a free collective bargaining system. That may possibly be a reason that the number of labor cases is so small in Japan in comparison with other countries, despite the allegation that employees and unions in Japan are very aware of their endowed rights, if not suffering from excessive legalism. In other words, we may assume that the court's overcommitment to its role in resolving labor conflicts has an accelerating rather than a restraining effect upon the voluntary resolution of labor conflicts.

Id. at 193.

³²⁶ *Id.* at 191-92.

³²⁷ See generally Wald & Wolf, *Recent Developments in the Law of Employment at Will*, 1 LAB. LAW. 533 (1985) (discussing the public policy and good faith exceptions). Sometimes there is reluctance by the courts to "create" new law: The plaintiff's wrongful discharge action based on an allegedly retaliatory discharge by his employer "is best evaluated by the legislative branch and the determination of the appropriate format for such proposed legislative change, if any, is best weighed by the legislature." *Bortijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 794, 635 P.2d

are also passing legislation addressed at "unjust dismissals" although much of the law is directed toward specific abuses, such as dismissal of "whistleblowers."³²⁸ Federal legislation has also been proposed.³²⁹ Reasons for comprehensive legislation include employees' need for protection, employers' desire to place a cap on "run-away damages," employers' entrepreneurial interest in selecting and removing managerial staff, the hope of attorney fees, and the impact of dismissals on labor unions and their traditional role as protector of employees' job security.³³⁰ Some commentators argue, however, that comprehensive state legislation may be inappropriate and an over-reaction that could spur increased litigation and interference with management affairs.³³¹

a. Contract Theories

Liability of an employer for discharging an employee may be based on either of two contract theories. The first theory, requiring good faith and fair dealing

992, 997 (Ct. App. 1981). Other jurisdictions, however, employ a contrasting approach: "Because the courts are a proper forum for modification of the judicially created at-will doctrine, it is appropriate that we correct inequities resulting from harsh application of the doctrine by recognizing its inapplicability in a narrow class of cases." *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 379, 652 P.2d 625, 631 (1982) (footnote omitted).

³²⁸ See Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) (seminal article calling for legislation). See also DeGiuseppe, *The Recognition of Public Policy Exceptions to the Employment-at-Will Rule: A Legislative Function?*, 11 FORDHAM URB. L.J. 721, 738-44 (1983) (summary of state legislation); Wald & Wolf, *supra* note 327, at 550-53 (summary of state legislation).

³²⁹ See Wald & Wolf, *supra* note 327, at 550-51.

³³⁰ See Labor & Employment Law Section, State Bar of Cal., To Strike a New Balance, Labor & Employment Law News 1-7 (spec. ed. Feb. 8, 1984) [hereinafter cited as California Adhoc Committee] (recommending a comprehensive statute for California). The California legislature recently considered two bills regarding wrongful discharge. The Assembly proposal, A. 3017, 1983-84 Reg. Sess. (Feb. 14, 1984), called for use of mediation and arbitration and provided remedies including reinstatement, backpay, front pay (up to two years) where reinstatement is inappropriate, and attorney fees. The bill, as amended, provided some relief for violation of good faith dismissals but excluded tort damages including punitive damages. *Id.* (amended May 3, 1984).

³³¹ The minority members of the California Adhoc Committee on Termination at Will and Wrongful Discharge noted that:

In short, we believe that [such comprehensive legislation] is an over-reaction to the current state of the law to suddenly provide millions of employees with still another forum to litigate the circumstances and motives of every termination and layoff in the State of California. The extensive litigation that will result and the inevitable interference with management's reasonable exercise of business judgment are too great a price to pay for the limitation of exposure against excessive damages which is offered by the majority.

California Adhoc Committee, *supra* note 330, at 39.

in discharges,³³² is illustrated by *Monge v. Beebe Rubber Co.*³³³ In *Monge*, an employer discharged an at-will employee after she resisted her foreman's sexual advances. The New Hampshire Supreme Court held the employer liable for breach of an implied good faith obligation to retain the employee.³³⁴ The court imposed the implied-in-law obligation in order to protect victimized employees from such unfair dismissals.³³⁵ Other courts have permitted recovery in tort for breach of a "good faith" covenant.³³⁶

The second theory of liability, implied-in-fact contract liability, involves application of traditional contract analysis when there are sufficient oral or written representations to convince a court that a contract obligation exists.³³⁷ Such representations may involve an employer's assurance of continued employment provided the employee performs satisfactorily. The employer can give assurance in personnel policies, employee handbooks, employer memoranda, or statements by supervisors.³³⁸ The clear majority rule, however, is that personnel policies by

³³² An example of courts which have rejected this theory is the Hawaii Supreme Court.

[T]o imply into each employment contract a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith.

We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts.

Parnar v. Americana Hotels, Inc., 65 Hawaii at 377, 652 P.2d at 629. *See also Butz v. Hertz Corp.*, 554 F. Supp. 1178, 1183 (W.D. Pa. 1983) (no federal common-law right absent specific intent to cause harm); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979) (cause of action for wrongful discharge only if specific intent to harm or clear mandate of public policy).

³³³ 114 N.H. 130, 316 A.2d 549 (1974). *See also Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). The *Fortune* court held that an employer breached an obligation of good faith when it terminated an employee when the employee was about to complete a sale and thereby collect a commission. *Id.* at 104-05, 364 N.E.2d at 1257. The court did not go so far as to hold that a good faith requirement existed in all employment contracts. *Id.* at 104, 364 N.E.2d at 1257.

³³⁴ 114 N.H. at 133, 316 A.2d at 551. First, this theory of liability requires that the employee show that the employer was "motivated by bad faith, malice, or retaliation." *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 921, 436 A.2d 1140, 1143 (1981). Second, the employee must show that he was "discharged because he performed an act that public policy would encourage, or refused to do something that public policy would condemn." *Id.* at 922, 436 A.2d at 1144.

³³⁵ 114 N.H. at 133, 316 A.2d at 551.

³³⁶ *See, e.g., Cancellier v. Federated Dep't Stores*, 672 F.2d at 1318; *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). *See Miller & Estes, Recent Judicial Limitations on the Right of Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65, 83-97 (1982).

³³⁷ *See Miller & Estes, supra* note 336, at 97-102.

³³⁸ *See, e.g., Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980) (employees' manual); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983) (employees' handbook); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (handbook, policy manual, employer conduct).

themselves will be insufficient to create contractual liability.³³⁹

A related theory is promissory estoppel.³⁴⁰ In *Grouse v. Group Health Plan, Inc.*,³⁴¹ the plaintiff resigned a position in reliance on a promise of a new job, but was never given the opportunity to perform. The Minnesota Supreme Court held the employer liable on the basis of promissory estoppel because the employee acted reasonably and was justified in relying on the employer's promise of employment.³⁴² Most courts, however, have rejected this theory of recovery for wrongful discharge.³⁴³

b. Tort Theories

Tort theories of liability,³⁴⁴ as exceptions to the at-will rule, are collected under the large and somewhat flexible doctrine that clear violations of public policy are grounds for recovery in tort. The initial problem under this exception is determining an acceptable definition of the term "public policy." The term is nebulous and leaves much room for judicial interpretation. The New Jersey Supreme Court has set forth the following guidance: "The sources of public policy include legislation; administrative rules, regulations or decisions; or judicial decisions. . . . Absent legislation, the judiciary must define the cause of action in case-by-case determinations."³⁴⁵

Courts applying the public policy exception have held employers liable for retaliatory discharges of employees who refused to violate the law,³⁴⁶ who exercised various statutory rights against the interest of the employer,³⁴⁷ and who

³³⁹ See, e.g., *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982) (An employee handbook distributed after hiring was not enforceable since it was not part of the employment contract.); *Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 649 P.2d 181 (1982) (Oral personnel policies and grievance procedures did not support employee's claim that she was terminable only for just cause.).

³⁴⁰ See *Ravelo v. County of Hawaii*, 66 Hawaii 194, 658 P.2d 883 (1983) (promissory estoppel available as a cause of action against wrongful discharge of an at-will employee).

³⁴¹ 306 N.W.2d 114 (Minn. 1981).

³⁴² *Id.* at 116.

³⁴³ See, e.g., *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982).

³⁴⁴ The significance of tort liability, unlike contract liability, under United States law is the availability of punitive damages. See D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 12.4, at 818 (1973).

³⁴⁵ *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980). A lower New Jersey court also held that this list may on occasion include a professional code of ethics. *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (App. Div. 1982) (pharmacist code of ethics).

³⁴⁶ See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to participate in illegal price-fixing scheme).

³⁴⁷ See, e.g., *Smith v. Piezo Technology & Professional Adm'rs*, 427 So. 2d 182 (Fla. 1982) (discharged for filing workers' compensation claims).

threatened to reveal the employer's illegal conduct. The last instance is illustrated by *Parnar v. Americana Hotels, Inc.*³⁴⁸ where the Hawaii Supreme Court held that an employer violated public policy when he fired an employee who was about to testify before a grand jury investigating the employer's antitrust violations.³⁴⁹ Courts usually have not found sufficient public policy when employees were dismissed for protesting company policies.³⁵⁰

Many jurisdictions have not yet recognized the public policy exception to the at-will rule. Some have rejected it. For example, in *Murphy v. American Home Products Corp.*,³⁵¹ a New York court refused to extend liability to employers for discharges in violation of public policy: "such recognition must await action of the Legislature."³⁵² Other courts have limited recovery when there were existing remedies to protect the interests of the aggrieved party because public policy already would be served and, therefore, no cause of action for wrongful discharge was required.³⁵³

Two other tort theories may permit recovery for wrongful discharge. One, although not widely accepted, is based on the intentional or negligent infliction of emotional distress when the discharge was outrageous.³⁵⁴ The other is traditional tort negligence.³⁵⁵

An "agenda item" is whether employers should have more discretion to dismiss managerial employees than non-managerial employees, especially at the higher executive levels where "teamwork, loyalty, and trust" are valued as much as performance. It is possible that courts may fashion different tort standards or contractual expectations if such a distinction is in fact recognized. To date most courts have not explicitly delineated the two categories.³⁵⁶ A pro-

³⁴⁸ 65 Hawaii 370, 652 P.2d 625 (1982).

³⁴⁹ *Id.* at 380, 652 P.2d at 631.

³⁵⁰ See, e.g., *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982) (complaining about internal company policies); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (opposing continued research on a controversial drug); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (complaints to a superior about the unsafeness of a product).

³⁵¹ 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

³⁵² *Id.* at 297, 448 N.E.2d at 87, 461 N.Y.S.2d at 233. Accord *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).

³⁵³ See, e.g., *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052 (E.D. Pa. 1977), *aff'd*, 619 F.2d 276 (3d Cir. 1980).

³⁵⁴ See *Agarwal v. Johnson*, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979) (outrageous and defamatory acts). But see *Avallone v. Wilmington Medical Center, Inc.*, 553 F. Supp. 931 (D. Del. 1982) (no recovery).

³⁵⁵ See, e.g., *Sherman v. St. Barnabas Hosp.*, 535 F. Supp. 564 (S.D.N.Y. 1982). For negligent employee performance evaluation, see *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982) (employee recovered but was found to be 83% at fault).

³⁵⁶ But see *Crosier v. United Parcel Serv., Inc.*, 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983) (managerial employee); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal.

posed wrongful discharge bill in California, however, would have given implicit recognition to this distinction by excluding from its scope bona fide executives or high policymakers entitled to a pension of at least \$27,000 per year.³⁶⁷

Another "agenda item" is whether a manager or supervisor with firing responsibilities may be held personally liable for wrongfully discharging an employee. This issue has not been fully developed since many victims obtain relief from the company and have no need to seek individual liability. A New York court, however, did find a school principal personally liable for firing an employee who had filed a discrimination complaint.³⁶⁸

c. Remedies

The usual common law relief for breach of contract and tort are available in wrongful discharge cases. In breach of employment contract cases, courts normally award compensatory damages³⁶⁹ in lieu of reinstatement, which is viewed in many jurisdictions as an extraordinary remedy to be granted only when damages are inadequate.³⁶⁰ Tort liability is often more desirable to a discharged employee because of the availability of potentially large damage awards including punitive damages.³⁶¹

d. Defenses

Wrongful discharge cases brought under either contract or tort theories of liability are subject to the traditional defenses. For example, California courts have held that allegations of oral contract commitments by an employer to an employee may be barred by the statute of frauds when there is no writing to

Rptr. 917 (1981) (managerial employee).

³⁶⁷ A. 3017, 1983-84 Reg. Sess. (Feb. 14, 1984).

³⁶⁸ *Maloff v. City Comm'n on Human Rights*, 46 N.Y.2d 902, 387 N.E.2d 1213, 414 N.Y.S.2d 897 (1979). Courts have held that whether an individual defendant can be sued depends on whether the individual was acting within the scope of his authority. *See, e.g.*, *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076 (N.D. Cal. 1982) (within scope); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (outside scope); *Harless v. First Nat'l Bank*, 289 S.E.2d 692 (W. Va. 1982) (within scope).

³⁶⁹ These damages may include lost fringe benefits—vacation pay, bonuses, and commissions. *See DeGiuseppe, supra* note 328, at 786-93.

³⁶⁰ *See D. DOBBS, supra* note 344, § 12.25, at 929-31. Some commentators have proposed reinstatement as a remedy in wrongful discharge cases and the elimination of punitive damages for tort violations. *See California Adhoc Committee, supra* note 330, at 13-14.

³⁶¹ One California survey of wrongful discharge cases between 1980 and 1982 involving jury verdicts showed plaintiffs recovered in 32 of 41 cases; of those 32 cases, 17 had awards of punitive damages, 6 of those had awards above \$600,000, and 13 of the 17 had awards above \$100,000. *See California Adhoc Committee, supra* note 330, at 5.

prove that the otherwise at-will employment relationship was extended for a period in excess of one year.³⁸² A Michigan federal court held that in a tort cause of action an employee's contributory negligence in causing her own discharge reduced an employer's liability for negligent performance evaluations.³⁸³

One of the most rapidly growing defenses in wrongful discharge cases is that of pre-emption. This defense raises the following "agenda items": (1) whether federal or state statutes provide exclusive remedies; (2) whether there can be duplicative relief when the federal or state government already provides remedies; and (3) whether the presence of grievance arbitration under a collective bargaining agreement alters the availability of common law rights.

Courts have held that certain federal labor laws—including the National Labor Relations Act,³⁸⁴ Title VII,³⁸⁵ and the Employee Retirement Income Security Act of 1974³⁸⁶—pre-empt the common law wrongful discharge cause of action. One court noted that to hold otherwise would mean "the remedies provided by state and federal law would have no meaning."³⁸⁷ Not all courts have agreed. For example, in *Cancellier v. Federated Department Stores*,³⁸⁸ the Ninth

³⁸² See *Sorosky v. Burroughs Corp.*, 37 Fair Empl. Prac. Cas. (BNA) 1510 (C.D. Cal. 1985); *Munoz v. Kaiser Steel Corp.*, 156 Cal. App. 3d 965, 203 Cal. Rptr. 345 (1984). Hawaii also follows this rule. *McIntosh v. Murphy*, 52 Hawaii 29, 429 P.2d 177 (1970). Not all courts, however, agree that the statute of frauds will apply to terminable at-will employees' employment agreements. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (contract need not "by its terms" be performed within one year).

³⁸³ *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982) (damages reduced by employee's 83% negligence).

³⁸⁴ See, e.g., *Viestenez v. Fleming Cos.*, 681 F.2d 699 (10th Cir.), cert. denied, 459 U.S. 972 (1982) (alleging discharge for union activities). Of course what activity is arguably protected under a statute may be a matter of some debate. For example, the National Labor Relations Board and courts have "wrestled" with the proper interpretation of an individual employee's protected "concerted activity." See *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984) (no concerted activity), rev'd sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), cert. denied, 106 S. Ct. 352 (1985); *NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984) (on facts similar to *Meyers*, concerted activity was found due to rights under collective bargaining agreement). See also Grossman, *NLRA Preemption of Wrongful Discharge Actions: A Perspective*, 1 LAB. LAW. 583 (1985); Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635 (1983).

³⁸⁵ See, e.g., *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84, 89 (N.D. Ill. 1982). But see *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1206 (8th Cir. 1984) (no pre-emption). Title VII specifically provides that it does not "exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]." 42 U.S.C. § 2000e-7 (1982).

³⁸⁶ *Johnson v. Transworld Airlines, Inc.*, 149 Cal. App. 3d 518, 196 Cal. Rptr. 896 (1983). See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (1982).

³⁸⁷ *Brudnicki v. General Elec. Co.*, 535 F. Supp. at 89.

³⁸⁸ 672 F.2d 1312 (9th Cir.), cert. denied, 459 U.S. 859 (1982). See Age Discrimination in

Circuit Court of Appeals held that the Age Discrimination in Employment Act did not pre-empt a tort claim when the state relief did not duplicate the federal statutory relief.³⁶⁹ In *Belknap, Inc. v. Hale*,³⁷⁰ the United States Supreme Court decided the issue whether an employee hired as a strike replacement, allegedly as a "permanent employee," had state common law contract rights even though the federal National Labor Relations Act provided for "exclusive remedies" regarding strikers' rights.³⁷¹ The Court held that "a State may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law."³⁷² The Court allowed the employee's state breach of contract cause of action to proceed.³⁷³

State law may also pre-empt common law rights against wrongful discharge. In *Strauss v. A.L. Randall Co.*,³⁷⁴ the California Court of Appeals found that statutory relief for age discrimination under a state statute provided plaintiff an exclusive remedy and thus precluded a wrongful discharge action.³⁷⁵ Some courts, however, have held that a state statute is not exclusive and merely cre-

Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982).

³⁶⁹ 672 F.2d at 1318. *But cf.* *Platt v. Burroughs Corp.*, 424 F. Supp. 1329, 1340 (W.D. Pa. 1983) (when claiming unfair practice based on age, the Age Discrimination in Employment Act is the exclusive remedy).

³⁷⁰ 463 U.S. 491 (1983).

³⁷¹ *Id.* at 493.

³⁷² *Id.* at 509 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)). *Accord* *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1916 (1985) ("The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."). See Note, *Labor Law Preemption After Belknap, Inc. v. Hale: Has Preemption as Usual Been Permanently Replaced?*, 17 IND. L. REV. 491 (1984).

Note that supervisors and managerial employees are not protected by the National Labor Relations Act and presumably the pre-emption issue would not be raised if they were to bring wrongful discharge cases. *Cf.* *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402 (1982) (supervisors not protected under the Act). *But cf.* *Sitek v. Forest City Enters., Inc.*, 587 F. Supp. 1381 (E.D. Mich. 1984) (Under certain circumstances, discharge of a supervisor may violate § 8(a)(1) of the Act as an unfair labor practice.).

³⁷³ 463 U.S. at 512.

³⁷⁴ 144 Cal. App. 3d 514, 194 Cal. Rptr. 520 (1983). "Pre-emption" is sometimes used interchangeably with "exclusivity" of remedies, and "preclusion" of alternative relief.

³⁷⁵ *Id.* at 519-21, 194 Cal. Rptr. at 523-24. *Cf.* *Wolk v. Saks Fifth Ave., Inc.*, 728 F.2d 221 (3d Cir. 1984) (sex harassment); *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 155 Cal. Rptr. 486 (1979) (worker's compensation). *But cf.* *McGee v. McNally*, 119 Cal. App. 3d 891, 174 Cal. Rptr. 253 (1981) (cause of action for intentional infliction of emotional distress was exception to exclusivity of workers' compensation).

Often a court will decide that a statute provides exclusive relief when discussing whether a "public policy" exception to the "at-will" doctrine should be found and will conclude that the public policy is already served by the statutory relief. See *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052.

ates rights in addition to a pre-existing common law right.³⁷⁶

The most dramatic development of case law involving pre-emption of wrongful discharge causes of action arises when there is a collective bargaining agreement.³⁷⁷ Under traditional American labor law, arbitration is the preferred method of settling labor disputes. Courts will defer to arbitration and will not readily second-guess or set aside an arbitrator's award.³⁷⁸ Therefore, an employee, whose wrongful discharge claim involves a matter covered by a collective bargaining agreement containing a grievance arbitration provision, normally will not receive judicial review of his grievance on the merits.³⁷⁹ This appears to be true for both tort³⁸⁰ and contract claims, including those based on implied covenants of good faith.³⁸¹

Courts have invoked exceptions to this rule when certain statutory rights form the bases of the claims. For example, the United States Supreme Court has held that Title VII claims³⁸² and claims arising under the Fair Labor Standards Act³⁸³ may be heard de novo in federal court notwithstanding arbitration awards because of the important public interest embodied within these statutes. The Court, however, has held that federal rights to trial de novo may be lost through prior settlement or adjudication of the claims in a state proceeding.³⁸⁴

³⁷⁶ See, e.g., *Brown v. Transcon Lines*, 284 Or. 597, 611, 588 P.2d 1087, 1094 (1978) (A workers' compensation statute did not expressly supersede the common law right, especially where the "new statutory right is not an adequate one.").

³⁷⁷ For a discussion of the pre-emption doctrine in wrongful discharge cases where the employee was covered under a collective bargaining agreement, see Wheeler & Browne, *Preemption of Wrongful Discharge Claims of Employees Covered by Collective Bargaining Agreements*, 1 LAB. LAW. 593 (1985).

³⁷⁸ See "Steelworkers Trilogy": *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

³⁷⁹ See, e.g., *Lamb v. Briggs Mfg., Div. of Celotex Corp.*, 700 F.2d 1092 (7th Cir. 1983) (no cause of action for retaliatory discharge where employee was a party to a collective bargaining agreement which provided a just cause guarantee and arbitration remedies).

³⁸⁰ *Id.*

³⁸¹ See, e.g., *Bertrand v. Quincy Mkt. Cold Storage & Warehouse*, 728 F.2d 568 (1st Cir. 1984) (rejected tort theory and held the implied contractual term, if successful, would have been part of the contract and was thus a theory grounded in contract).

³⁸² *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

³⁸³ *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981).

³⁸⁴ *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982) ("[M]erits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum."). Cf. *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468 (9th Cir. 1984) (Federal labor law claims masked as state law claims must be pursued in federal court.). Absent settlement or final adjudication, Title VII clearly provides that state rights are not pre-empted by Title VII. 42 U.S.C. § 2000e-7 (1982). See *Lucas v. Brown & Root, Inc.*, 736 F.2d at 1206 ("Title VII does not preempt this state-law contract claim.").

In *Garibaldi v. Lucky Food Stores, Inc.*,³⁸⁵ the Ninth Circuit Court of Appeals addressed the issue of whether a wrongful discharge cause of action based on the public policy exception to the at-will doctrine may qualify for de novo state court proceedings after an adverse arbitration award, thus extending non-deference to arbitration from statutory rights to those grounded in "public policy."³⁸⁶ In *Garibaldi*, a unionized employee was fired for protesting and refusing to deliver spoiled milk. He brought a wrongful discharge action after an adverse arbitration award. The Ninth Circuit held that his action was not precluded because public policy was involved.³⁸⁷

The application in *Garibaldi* of the wrongful discharge remedy to unionized employees would seem to threaten the finality and stability of arbitration awards under collective bargaining agreements. The authority of this holding, however, may be short-lived as the United States Supreme Court recently held in *Allis-Chalmers Corp. v. Lueck*³⁸⁸ that state tort claims which could have been resolved by interpretation of a collective bargaining agreement were pre-empted.³⁸⁹ The Court held that:

[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim. . . or dismissed as pre-empted by federal labor-contract law. This complaint should have been dismissed for failure to make use of the grievance procedure established in the collective-bargaining agreement. . . or dismissed as pre-empted by § 301.³⁹⁰

³⁸⁵ 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985).

³⁸⁶ 726 F.2d at 1371-76.

³⁸⁷ *Id.* at 1376. *Contra* *Lamb v. Briggs Mfg., Div. of Celotex Corp.*, 700 F.2d at 1095-96 (An employee who is a party to a collective bargaining agreement may not sue his employer in tort for a retaliatory discharge even if "public policy" is involved because, in part, there is a conflicting "policy" to protect "orderly industrial relations.").

³⁸⁸ 105 S. Ct. 1904 (1985).

³⁸⁹ *Id.* at 1916.

³⁹⁰ *Id.* Section 301 of the National Labor Relations Act provides that suits for violations of collective bargaining agreements "may be brought in any district court." 29 U.S.C. § 185(a) (1982). The policy supporting the court's decision was, once again, to avoid undermining the arbitration process:

Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 [of the Act] is not understood to pre-empt such claims. . . . A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness. . . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

105 S. Ct. at 1915-16 (citation omitted).

The Court cautioned that its holding was limited to the facts of the case and was not necessarily applicable to other federal and state labor laws.³⁹¹

Unionized workers' common law claims may therefore be pre-empted by statute or by a collective bargaining agreement.³⁹² Wrongful discharge claims of *non-unionized* workers, on the other hand, would only be pre-empted by statute. Thus, the non-unionized employee would have a greater chance of avoiding the pre-emption defense and recovering punitive damages.

Employers also use self-help techniques as "defenses" to avoid liability. These techniques include contract provisions wherein the employee agrees to his status as an at-will employee,³⁹³ careful review of personnel manuals and statements made by supervisors during interviews and after hiring, and "patrol" policies to prevent unintentional creation of rights for at-will employees.³⁹⁴ Management is

³⁹¹ The Court noted that:

We pass no judgment on whether this suit also would have been pre-empted by other federal laws governing employment or benefit plans. Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis.

105 S. Ct. at 1916.

³⁹² Cf. *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 106 S. Ct. 278 (1985). The *Midgett* court rejected the argument that non-union "at-will" employees needed more protection than unionized employees and held that unionized employees also had a right to contract and tort relief. 105 Ill. 2d at ____, 473 N.E.2d at 1283. The court added that relief under a collective bargaining agreement was incomplete since no punitive damages can be awarded as would be possible under tort relief and it would be unfair to permit the award of punitive damages to non-unionized employees while denying it to unionized employees. *Id.* at ____, 473 N.E.2d at 1284. This decision by the Illinois Supreme Court was prior to *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985).

³⁹³ Such disclaimer provisions have been upheld in pre-employment applications, *see, e.g.*, *Batchelor v. Sears, Roebuck & Co.*, 574 F. Supp. 1480 (E.D. Mich. 1983); and post-hire agreements, *see, e.g.*, *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 529 (1984).

³⁹⁴ One commentator suggested the following:

1. Put the grounds for termination in writing and distribute this information to all employees. . . .
2. Document every termination action. . . .
3. Refine performance evaluations to give honest appraisals of each employee's weak and strong points. . . .
4. Provide advance warning that an employee has taken a course possibly leading to termination unless changes occur in his/her performance. . . .
5. Watch for signs of an employee's work problems. . . .
6. Involve two or more persons in the termination process. . . .
7. Review severance pay policies. . . .
8. Develop a severance package that includes continuance, for a limited time, of health and life insurance benefits. . . .

quite aware that it has much to lose if a jury awards punitive damages.

Knowledge of these legal and practical defenses to a wrongful discharge cause of action, whether based on contract or tort, is especially important to the Japanese. The Japanese practice of emphasizing job security and retaining employees even after poor evaluations might provide evidence that a discharge of an American employee was wrongful. Japanese employers are also reluctant to seek early legal advice before the problems occur. The Japanese must therefore increase their awareness of the "agenda items" identified above in order to avoid labor problems in their American ventures.

V. CONCLUSION

One of the most important problems confronting the United States and Japan is how to deal with increasing Japanese operations in the United States: "Next to international trade relations, Japanese direct investment in U.S. manufacturing is probably considered one of the most socially sensitive and significant issues in United States-Japan economic relationships. The reasons for this are several and likely differ depending which side of the Pacific one is on."³⁹⁵

The Japanese argue that American-based Japanese manufacturing companies which hire American citizens displace not only exports from Japan, but also Japanese workers who otherwise might have manufactured these same products in Japan. They further note that other foreign markets may present more economic opportunity and that uncertainties created by laws and trade regulations in the United States make these other markets a more attractive alternative to direct investment in the United States.³⁹⁶ Many Americans, while worried about the increasing trade deficit, see Japanese direct investment as a positive step toward creating more job opportunities for American citizens and as a way of obtaining quality Japanese products at a lower price.³⁹⁷

When Japanese employers arrive in the United States they bring their management and industrial relations practices and seek to adapt them to local conditions. Japanese companies and American companies which are starting to

9. Terminate only when you must, and terminate only with care and compassion. . . .

10. Consider buying "defense and judgment" insurance. This relatively new form of coverage protects employers against lawsuits arising from cases other than personal-injury or property-damage suits covered under conventional insurance policies.

Decker, *At-Will Employment in Pennsylvania—A Proposal for Its Abolition and Statutory Regulation*, 87 DICK. L. REV. 477, 504-05 (1983).

³⁹⁵ Kujawa Case Study, *supra* note 71, at 1.

³⁹⁶ *See id.*

³⁹⁷ "From the U.S. perspective, foreign direct investment has been viewed (perhaps inaccurately) as an alternative to trade and as a method for reducing international commercial friction." *Id.* at 2.

adopt some Japanese-style approaches to labor relations may face legal tests: whether their management practices violate equal employment opportunity laws and laws relating to unionization and discharge of workers.

From the American lawyers' perspective, "too many parties fail to analyze thoroughly the labor impact. . .and they are taken by surprise when labor law matters either interfere with. . .or materially change the business planner's expectations."³⁹⁸ While many technical areas of labor law must be considered and resolved, the large policy issues involved in international relations and domestic labor policies must not be ignored.

Indeed, the search for appropriate accommodation of Japanese management practices and United States labor laws will necessitate greater understanding of the two countries based on a sharing of information and on closer cooperation on common issues. As one author has observed:

To understand Japan is to realize that the country is truly unique; its noticeable mantle of Americanization is just that, a cloak. It is also essential to realize the uniqueness of the American people, and to know that solutions and truth between the two countries spring from working together, not from merely comparing or studying the differences.³⁹⁹

³⁹⁸ Kelley & Lengel, *In Acquisition, Don't Get Tripped Up by Labor Law*, Legal Times of Wash., Feb. 22, 1982, at 17, col. 1.

³⁹⁹ Yamada, *Japan: An Introduction*, 15 CASE W. RES. J. INT'L L. 415, 418 (1983).

